

Office Supreme Court U.S.
FILED
OCT 24 1921
WM. R. STANSBURY CLERK

Supreme Court of the United States

October Term, 1921

No. 296

CHARLES D. NEWTON, as Attorney-General of the State of New York; ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York, for the First District; and DENIS O'LEARY, as District Attorney of Queens County,

Appellants,

against

NEW YORK AND QUEENS GAS COMPANY,

Respondent.

BRIEF ON BEHALF OF APPELLANT CHARLES D. NEWTON, AS ATTORNEY-GENERAL

CHARLES D. NEWTON,

Attorney-General

of the State of New York

Capitol, Albany, N. Y.

WILBER W. CHAMBERS,

Solicitor for

Appellant Newton,

Capitol, Albany, N. Y.

WILBER W. CHAMBERS

CLARENCE R. CUMMINGS,

of Counsel.



INDEX TO POINTS

I	PAGE
Respondent earned more than a fair return while operating under the statutory rate from the time of its enactment in 1906, to 1918, inclusive.....	8
II	
The statute in question should not be tested upon the financial results obtained in the abnormal year of 1919, but the court should take into consideration the period from the time the statute was enacted in 1906 to 1919, inclusive, for respondent alleged in its bill of complaint confiscation during this period	14
III	
Respondent has accumulated a fund amounting to \$101,149.66 as a contingency reserve. The statute should not be declared confiscatory until this fund is exhausted. Temporary losses due to abnormal conditions, like any other hazards of business, should be debited against it, , , ,	33
IV	
Respondent earned a fair return in the year 1919.....	40
V	
The court below erred in failing to follow the rules laid down by this court that in determining the fair value of respondent's property, depreciation should be deducted... , , ,	62
VI	
Working and constructive capital, organization and undistributable structural items, generally called "overheads," are less than \$100,000.....	74
VII	
The fair value of respondent's property devoted to the making and distributing of gas and upon which it is entitled to a fair return, does not exceed the following amounts for the respective years.....	88
VIII	
The master erred repeatedly in the admission and exclusion of evidence which errors were not corrected by the court below,	98
IX	
The rate of return which a public utility was entitled to enjoy, as determined by the courts in normal pre-war times, is not decisive or controlling in the abnormal war period	107
X	
For the reasons assigned in the foregoing points the decree appealed from should be reversed and the bill of complaint dismissed, with costs.....	109

SUBJECT INDEX

	PAGE
Abnormal year 1919	16, 17
Accrued depreciation	73
Average fixed capital	10
Average fixed capital, including engineering (excluding land)	97
Average rate base, 1906-1918	11, 91
Average valuation of tangible property	92
Bill of complaint	5
Boiler fuel, excessive use of	58, 60
Books	60
Burden of proof	109
Coal, excessive use for boilers	58, 60
Complaint	5
Contingency, definition of	35
Contingency fund	33, 40
Contingency fund, resolution regarding	34
Cost of real estate, 1906-1918	11, 90
Depreciation should be deducted	62, 71
Donglaston extension, cost of building	99
Earnings 1906-1918 (unadjusted)	8, 9
Earnings, prior years to be considered	17, 33
Error of master and court in failing to follow the rule laid down by this court in determining fair value of respondent's property	62
Error of master in admission and exclusion of evidence	98, 107
Error of master in admission of books	106
Error of master in admission of complainant's Exhibit 77	106
Error of master in excluding from evidence interest on consumers' deposits, etc.	57
Error of master in characterizing testimony of appellants' witnesses	101
Error of master in not crediting cost of distribution	49
Error of master in not crediting cost of operation, \$19,770, 41, because of excessive repairs, etc.	11
Error of master in cutting off examination of witnesses	103
Error of master in excluding from evidence testimony of tax officials, City of New York	100, 101
Error of master in refusing to admit in evidence the reports of Newtown, Flushing Gas Co.	106
Examination of witnesses cut off	103
Excessive repairs at works	11, 48
Fair return	7
Fair market value of land	91
Fair value of land	11
Fair value of respondent's property, used and useful, 1906-1918	89, 94
Fair value respondent's property, used and useful, 1906-1919	10, 88
Fair value of respondent's property used and useful 1919	95, 98
Fixed capital other than land 1906-1919	92
Franchises	82, 86
History of respondent	6
Interest on consumers' deposits should be excluded, etc.	57
Interest on taxes during construction	86

	PAGE
Issues in the case	5
Land, used and useful	11
Legal expenses, organization, etc.	77
Net earnings, claimed by appellants, 1919.....	61
Omissions on contingencies	86
Operating income, 1906-1918	8
Order of reference	4
Organization, legal general and preliminary expenses.....	77 81
Period	14
Period, 1913-1914	22
Preliminary expenses, general, legal	77
Price levels	26
Proper period of time	14
Rate base, 1906-1918	94
Rate base, 1919	98
Rate base, expenses	9, 10
Rate of return	7, 107
Real estate, cost of	90
Repair, labor and materials	41
Repairs at works, excessive	41 48
Repairs of transmission and distribution system	51
Return enjoyed by respondent, 1906-1918	11
Return enjoyed in 1919	40 61
Revenues, expenses	8
Table showing average rate base, 1906-1918	94
Table showing net earnings, 1919	61
Table showing excessive repairs at works	48
Table showing excessive reparts of transmission and distribution	51
Table showing repairs at works	48
Table showing repairs of transmission and distribution	49 51
Table showing return enjoyed by respondent, 1906-1918, without excluding improper items	13
Unaccounted for gas, 1909-1919, shown by company's books	52
Unaccounted for gas, average 1909-1919	54
Uncollectible bills, etc.	55
Uniform system of accounts	74
Used and useful land	95
Working and construction capital	74 77
World war prices	16

LIST OF STATUTES AND CASES CITED

Boyle v. St. Louis S. F. R. R. Co., 222 Fed. Rep. 539, 21, 32,	49
Brooklyn Borough Gas Co. v. Public Service Comm., 17 N. Y.	
State Depts. Rep. 81	72
Brooklyn Heights R. R. Co. v. State Board of Tax Commrs.,	
69 Misc. 646	71
Brooklyn Union Gas Co. v. Nixon, et al., (unreported)	36, 37
Bronx Gas & Elec. Co. v. City of N. Y., 195 App. Div.	
554	32, 34
Central Union Gas Co. v. Newton, et al.,	58
Chapter 125, Laws 1906	5
City of Knoxville v. Knoxville Water Co., 261 Fed. Rep.	
283	32, 66, 67, 70

SUPREME COURT OF THE UNITED STATES

CHARLES D. NEWTON, as Attorney General of the State of New York; DENIS O'LEARY, as District Attorney of the County of Queens, State of New York; ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York, for the First District,

2

296
October Term,
1921

3

Appellants.

against

NEW YORK AND QUEENS GAS COMPANY,

4

Respondent.

BRIEF ON BEHALF OF APPELLANT, CHARLES D. NEWTON AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK.

This is an appeal by the above-named appellants from a decree of the United States District Court, Southern District of New York (Hon. Julius M. Mayer, District Judge, presiding), entered in the office of the said Court on November 19, 1920,

6 which decree enjoined and restrained the appellants, public officials of the State of New York, from enforcing the provisions of chapter 125 of the laws of 1906, which fixed the price of gas at \$1.00 sold to the inhabitants of the Third ward of the Borough of Queens, commonly known as Flushing and its environs.

7 The issues in this case were by order dated May 23, 1919, made by Hon. Julius M. Mayer, District Judge of the United States, Southern District of New York, referred to Abraham S. Gilbert, Esq., of New York city, to take the testimony and report to the Court (p. 25).

8 The Special Master rendered his report on July 16, 1920 (p. 45).

The report of the Master came before Hon. Julius M. Mayer for review.

The opinion of the learned Judge is reported in *New York and Queens Gas Co. v. Norton et al.*, 269 Federal Reporter 277. By reference to the opinion it will be seen that the Court found that it cost the respondent, during the year 1919, \$1,0129, or 129 cents in excess of the statutory rate, to make and deliver gas to the consumer (p. 112).

The Court below also found that "the actual cost of the tangible property aggregates \$1,130, 497.08 (p. 115) and then found that sum of \$1,130, 497.08 "as the smallest amount upon which a return should be figured." The Court below thus accepted as a valuation the actual cost of the tangible property as shown by the books of respondent, *without any deduction for depreciation*.

THE ISSUES IN THE CASE

11

This action was brought on April 7, 1919, to have declared unconstitutional and void chapter 125 of the Laws of 1906, upon the ground that said statute was in contravention of section 10, article 1, of the constitution of the United States and the Fourteenth Amendment thereof.

The bill of complaint alleges (paragraph XIV, p. 6):

"During no year since its organization in 1904, have the earnings of your orator been sufficient to provide a return of as much as six per cent upon the reasonable value of its property devoted to the public use."

It further alleges (paragraph XVI, p. 7):

13

"The maximum price of one dollar per thousand cubic feet for gas, fixed by the said Act of 1906, has been, is and will continue to be wholly inadequate, in that it does not permit your orator to earn a reasonable return upon the fair value of its property devoted to the public use; and in fixing the said maximum price the said Act of 1906 has impaired, now impairs, and will continue to impair the obligation of your orator's contract with the State of New York, in violation of Section 10, Article 1, of the Constitution of the United States, and has deprived, now deprives and will continue to deprive your orator of its property without due process of law, and has denied, now denies and will continue to deny it the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the said Constitution."

14

15

It will be noted from the quotation above that respondent in its bill of complaint, which was never amended, that in no year since 1904 have

- 16 the earnings been sufficient to provide a return of 6 per cent.

The answer of the Attorney-General and other appellants denied all the material allegations in the bill of complaint.

HISTORY OF THE RESPONDENT

- 17 The respondent is a domestic corporation, organized under the Transportation Corporations Law, State of New York, on July 12, 1904, for the purpose, among other things of manufacturing and supplying gas for lighting the streets, public places and private buildings in the city of New York. It operates a water gas plant located in the former village of Flushing, in the third ward of the Borough of Queens, city of New York, where it supplies gas to about 11,000 consumers. It is the only company furnishing gas within the territory described.

- 18 All of the stock of respondent, except qualifying shares, is owned by the Consolidated Gas Company of the city of New York.

- 19 The facts will be discussed under the various points.

We shall ask the court to reverse the decree appealed from and dismiss the bill of complaint upon the following grounds:

- 20 1. Respondent earned more than a fair return while operating under the statutory rate from the time of its enactment in 1906 to 1918, inclusive.

2. The statute in question should not be tested upon the financial results obtained in the abnormal year of 1919, but the court should take into consideration the period from the time the statute

was enacted in 1906 to 1919, inclusive, for respondent alleged in its bill of complaint confiscation during this period. 21

3. Respondent has accumulated a fund amounting to \$101,149.66, as a contingency reserve. This was built up from payments made by consumers for gas furnished them in prior years. The statute should not be declared confiscatory until this fund is exhausted. Temporary losses due to abnormal conditions like any other hazards of business, should be debited against it. 22

4. Respondent earned a fair return for the year 1919.

5. Working and construction capital, organization and structural items, generally called "overhead" are less than \$10,000. 23

6. The court below erred in failing to follow the rule laid down by this court in determining the fair value of respondent's property, depreciation should be deducted.

7. The fair value of respondent's property devoted to making and distributing gas does not exceed \$898,545 for 1919, and does not exceed the amounts set forth in Point —, for the years 1906 to 1918, inclusive. 24

8. The Master committed reversible errors in the admission and exclusion of evidence which errors were not corrected in the court below.

9. The rate of return which a public utility is entitled to enjoy as determined by the courts in normal pre-war times is not decisive or controlling in the abnormal war period. 25

POINT I

RESPONDENT EARNED MORE THAN A FAIR RETURN WHILE OPERATING UNDER THE STATUTORY RATE FROM THE TIME OF ITS ENACTMENT IN 1906 TO 1918 INCLUSIVE.

Appellants contend that when a State statute is attacked on the ground that it is confiscatory, as in the instant case, that the earnings, as shown by the practical experience of the company, of all the years, or a period of reasonable length, should be reviewed by the Court and that a fair average return should thus be determined and is decisive of the question in this case.

27 In accordance with this contention, the appellants on the trial offered in evidence Exhibit A11 (p. 2810) and Exhibit A12 (p. 2811), showing the revenues and expenses of the respondent from August 1, 1904, the time of its organization to December 1, 1919.

28 The exhibits above referred to show the operating income, or excess of revenue over expenses, for the period as follows:

Year ended	Operating income
July 31, 1906,	\$38,411 13
July 31, 1907,	33,733 45
July 31, 1908,	50,464 03
Five months ending Dec. 31, 1908	27,462 65
30 December 31, 1909,	59,370 88
December 31, 1910,	66,537 04
December 31, 1911,	60,162 14
December 31, 1912,	70,187 60
December 31, 1913,	64,385 62
December 31, 1914,	62,475 00
December 31, 1915,	76,467 96

Year ended	Operating income	31
December 31, 1916.....	\$80,884 26	
December 31, 1917.....	56,736 70	
December 31, 1918.....	33,350 56	

(Ex. A11, p. 2810; A12, p. 2811).

The exhibits above referred to were compiled from the books of respondent by Mr. Cohen, a statistician of the Public Service Commission of the State of New York (p. 995-6). 32

The operating expenses as shown on these exhibits include for all these years many items properly deductible in a confiscatory case, as interest on unpaid taxes, Federal income tax, tax on bondholders income, rate case expense and others.

These items have been found by the Court below to be properly deductible for the year 1919, the only year reviewed by the Court in the instant case. 33

The learned Court below found no rate base or valuation of respondent's property, other than for the year 1919. The rate base so found was \$1,130,497.08 (p. 115). 34

The appellants, however, introduced proof of a fair valuation of respondent's tangible and intangible property, for the period from July 31, 1906, to December 31, 1909. This valuation was determined by Willard F. Hine, a public utility engineer of wide experience and formerly the chief gas engineer of the Public Service Commission of the State of New York, First District. 35

While in the employ of that Commission, Mr. Hine made most of the valuations for that well known and important Commission for use in the rate inquiries and other matters coming before it.

36 Mr. Hine showed that the fair value of respondent's property does not exceed the following average amounts for these years.

	December 31, 1906,	\$402,711
	December 31, 1907,	434,253
	December 31, 1908,	467,593
	December 31, 1909,	503,170
37	December 31, 1910,	536,825
	December 31, 1911,	584,825
	December 31, 1912,	615,422
	December 31, 1913,	639,099
	December 31, 1914,	672,132
	December 31, 1915,	751,773
	December 31, 1916,	831,868
38	December 31, 1917,	867,872
	December 31, 1918,	871,875

How the foregoing table is made up is fully discussed under a later point. Suffice it to say here that the average fixed capital, including engineering and exclusive of land, is taken from defendant's Exhibit A109, p. 1877, corrected by deducting for each year the sum of \$33,444, a typographical error made in addition on the aforesaid table. (See pp. 1332 and 1333.) That is to say instead of correcting the table as printed in the record, it is corrected by the testimony above referred to the extent indicated.

40 The foregoing fair value of respondent's property for each of the years beginning in 1906, to December 31, 1918, stands uncontradicted, and there is no evidence save this, of any fair value of respondent's property during those years.

The following table sets forth the operating income, as shown by the company's books and

above referred to and the average rate base as determined by Mr. Hine also referred to above, during these years.

It shows clearly that the respondent enjoyed a return of 9½ per cent on the fair value of its property during the years 1906 to 1918, inclusive, and in addition thereto set aside out of these earnings a "contingency" fund amounting to \$101,149.66 (Ex. A9, p. 2898). This contingency fund is discussed under a separate point.

In this table we have included all the land used and useful at cost. This cost of the real estate is fully discussed in a later point. It amounts to the following:

1906 to 1908, inclusive, \$19,423;	43
1909-1910, inclusive, \$20,623;	
1911, \$26,524.25;	
1912, 1913 and 1914, \$27,652.25;	
1915-1916, inclusive, \$40,049.64; and in	
1917-1918, \$40,053.90. (Exhibit 96, 1606-1607.)	

It will readily be seen, therefore, that the allegation in the complaint of confiscation during this period was disapproved, and in addition it is manifest from this proof that respondent made considerable more than a fair return and created in addition thereto a tidy sum with which to take care of emergency or lean years when earnings might fall off.

We have already called attention above to the fact that there has been no attempt in this table to exclude improper items, such as (a) interest on unpaid taxes, (b) federal income tax, (c) tax on bondholders' income, (d) rate case expenses, and many others. When these are deducted the re-

46 turn during this period will be increased accordingly.

We contend that this lucrative period in the company's business under the rate complained of should be considered with the year of 1919, and that with such a showing as this the statute ought not to be declared confiscatory, even though the
47 earnings in 1919 decreased. And accordingly, in the following point we argue fully that the proper period to take would be 1906 to the end of 1919.

Table showing return enjoyed by respondent in years 1906-1918 inclusive without deducting improper items.

YEAR	Operating income	Average rate base	Six per cent on average rate base	Excess of respondent's income over 6 per cent on average rate base	Per cent of return of respondent's income on average rate base
July 31, 1906	\$38,411.13	\$102,711.00	\$21,162.66	\$14,218.47	9.5
July 31, 1907	33,733.45	431,253.00	26,055.18	7,678.27	7.8
December 31, 1908 (a)	77,926.68	167,503.00	28,055.58	49,871.10	16.7
December 31, 1909	59,370.88	503,470.00	30,208.20	29,162.68	11.7
December 31, 1910	66,537.01	536,825.00	32,209.50	34,327.54	12.4
December 31, 1911	60,162.14	584,825.00	35,089.50	25,072.64	10.3
December 31, 1912	70,187.60	615,422.00	36,925.32	33,261.28	11.4
December 31, 1913	64,385.62	639,099.00	38,345.94	26,039.68	10.1
December 31, 1914	62,475.00	672,132.00	40,327.92	22,147.08	9.3
December 31, 1915	76,407.95	751,773.00	45,106.38	31,361.58	10.1
December 31, 1916	80,884.26	831,868.00	49,912.08	30,972.18	9.7
December 31, 1917	56,736.70	867,872.00	52,072.32	4,664.38	6.5
December 31, 1918	33,350.56	871,875.00	52,312.50	618,961.94	3.8
	<hr/> \$780,629.02	<hr/> \$8,179,718.00	<hr/> \$400,783.08	<hr/> \$289,845.94	<hr/> 9.5

(a) From August 1, 1907, to December 31, 1908.
 (b) This year return less than 6 per cent, but same includes improper items.

51
52
53
54
55

POINT II

THE STATUTE IN QUESTION SHOULD NOT BE TESTED UPON THE FINANCIAL RESULTS OBTAINED IN THE ABNORMAL YEAR OF 1919, BUT THE COURT SHOULD TAKE INTO CONSIDERATION THE PERIOD FROM THE TIME THE STATUTE WAS ENACTED IN 1906 TO 1919, INCLUSIVE, FOR RESPONDENT ALLEGED IN ITS BILL OF COMPLAINT CONFISCATION DURING THIS PERIOD.

The Master and Court have given little attention to the period to be considered here. As a basis for his decision the Master has taken into consideration only the year 1919 and the first five months of 1920. His findings that the statute is confiscatory, however, seem to have been based upon the abnormal and unprecedented conditions of the year 1919, for he says in his findings No. 43:

"During * * * the twelve months ended December 31, 1919, and during the portion of 1920, covered by the proofs before me, the said net operating revenue did not and does not as of the present time provide any return whatever upon the said fair present value of any of the property so owned and used by the complainant company as hereinbefore found" (p. 43).

In the opinion, he says (p. 48):

"If, therefore, the actual results of operations for the year 1919 show the rate to be confiscatory, it follows that the net result of operations for the year 1920, which can only be determined in definite figures when the year has ended and the books for 1920 have

been closed, will show a larger deficiency than
appeared as the result of operations in the
year 1919. *I have therefore concluded to
base my findings as to the cost of making and
distributing gas especially upon the oper-
ations and costs established for the year 1919,*
those figures being taken, of course, in the
light of what I have just said, that the cost of
making and distributing gas in the year 1920
will be in excess of the figures I reach for the
year 1919." 61
62

In the bill of complaint, respondent company
alleges:

"During no year since its organiza-
tion in 1904 have the earnings of your orator
been sufficient to provide a return of as much
as 6 per cent upon the reasonable value of its
property devoted to the public use" (par.
XIV, p. 6). 63

And again:

"The maximum price of one dollar per
thousand cubic feet for gas, fixed by the said
act of 1906, has been, is and will continue to
be wholly inadequate, in that it does not
permit your orator to earn a reasonable re-
turn upon the fair value of its property
devoted to the public use; (par. XVI, p. 7). 64

This was the period, 1904 to 1919 selected by
respondent when it drew its bill of complaint.
During the course of the trial the complaint was
not modified or amended in this particular.

Appellants contend that the inquiry in this
case should cover the time during which the

66 statutory rate complained of has been in force, viz.: 1906 to 1919, inclusive, and the statute
67 should not be declared confiscatory merely by
68 considering the cost of making and distributing
gas during one or two abnormal years.

69 Respondent made no effort by suit or otherwise
70 to have the statute declared confiscatory until
71 the present abnormal conditions prevailed. It
72 had twelve years available in which to bring the
73 matter into court, for the results had been known
74 for each year, and year by year, from 1906 to
75 1918. These years as to price of labor, materials
76 and supplies and weather were normal and a fair
77 test of the operation of the statute could have
78 been obtained.

79 Beginning with about the year 1917, due to the
80 World War, prices began to increase and con-
81 ditions foretold that we were likely to enter into
82 abnormal times. The years of 1918 and 1919 will
83 go down in history as a time of great inflation of
84 prices. They were abnormal years.

85 It was not until the beginning of the year 1919
86 that respondent filed its bill of complaint. The
87 appellants contend that respondent deliberately
88 selected this period of abnormal, unusual and
89 unprecedented conditions to strike down the
90 statute in question, and that it is taking advan-
91 tage of a world-wide calamity to raise its rates.

92 Most of the witnesses admitted that the year
93 1919 was abnormal. Throughout the case the
94 Master made frequent references to the fact that
95 the year was abnormal.

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 71
19, Mr. Justice Peckham writing for the Court
(page 54), said:

"It may possibly be, however, that a practical experience of the effect of the Acts by actual operation under them might prevent the claimant from obtaining a fair return, as already described, and in any event complainant ought to have the opportunity of again presenting its case to the court." 72

It is quite apparent that this Court did not have in mind that such a statute was to be put to a test on evidence for one or two abnormal years alone, *but during the whole period in which the statute was in force and until such time as respondent complained of it.* The inquiry should have been directed to the whole time the statute has been in operation and a full and complete inquiry should have been made. The inquiry covering one or two years is not only unfair, unjust and inadequate, but manifestly will lead to an attack of the statute for every temporary change in valuations, prices of labor, materials or supplies. 73

There is ample authority to sustain our contention that the statute should not be so considered. 71

Respondent's contention is virtually that this Court should set aside an act of the Legislature which may have permitted the company an excessive rate of return for the many years in which this act has been operative, with the possible exception of 1919; the year being unprecedented and a year in which multitudes of individuals were making great sacrifices; a year in 75

76 which many companies as well as individuals were content with a greatly diminished return.

In the recent case of the *Municipal Gas Company v. Public Service Commission et al.*, the Court of Appeals said (225 N. Y. 89, p. 98):

77 "There was no need to go back to 1917 and disclose the earnings of earlier years.
The significance that they have is solely as evidence. They have no place in the complaint."

The above case was before the Court of Appeals upon a demurrer and there was nothing before the Court to show that the year 1918 was abnormal.

78 The Court of Appeals distinctly said that the earnings of earlier years were relevant. The Trial Court should consider this evidence. It goes without saying that if the case were to be decided upon the results of one year or one or two abnormal years it would be wholly unnecessary and futile to receive evidence relating to prior years. Consequently, the Court of Appeals must have expected that the evidence of the earnings of earlier years would receive some weight. Furthermore, the intention of the Legislature must be given some consideration. The Legislature has not attempted to fix the gas rate year by year. It did not reduce the rate for gas years prior to the war when this company was making a large profit, or considerably more than a fair return.

80 We have shown in another place in this brief that this company enjoyed a return in excess of 6 per cent. on an average.

Is it reasonable that the large profit in all these 81 years should be absolutely disregarded and that the legality or illegality of the Act should hinge upon the return for 1919 alone, particularly so when it clearly appears that these were abnormal and unusual times?

If the Master's finding be correct that the statute should be destroyed upon the returns made in 82 a year or a part of a year during an abnormal period, it would mean that the Legislature would be obliged to change the rate from year to year, in order to adjust that rate to the profits shown by the company. If the Legislature were to attempt to change the rate year by year, would it not be meet with the assertion that in years to 83 come respondent might encounter conditions which would not give it a reasonable return? Would it not also be claimed that the Legislature should not be continually modifying rates? Further, the results for any year would not be known to the Legislature in time for action to be taken until another year had passed, and by 84 that time the conditions might have changed.

If it be contended that the entire function of rate making should be turned over to the Public Service Commission and the Commission should be required to fix a rate immediately without reference to the statute, we desire to point out that such a plan would impose upon the Commission 85 such an enormous burden and such a host of rate cases every year that it would be entirely impracticable, and that many rates would go unregulated for lack of time to investigate the facts and render fitting decisions. It would become the duty of the Public Service Commission, at

- 86 the close of every fiscal year to review the financial condition of every utility to make or correct its findings as to the value of the property, and to decide whether to initiate a rate case, for no binding and legal decision could be rendered without giving each company an opportunity to be heard. This Court knows from experience the
- 87 large amount of time and expense involved in such a proceeding.

We call the Court's attention to the confusion which would result from a constant changing of rates and the difficulties which would arise in the adjustments of complaints. Every public utility would find its affairs in chaos and would protest against constant revisions. Many have already insisted that when a rate is fixed it should be allowed to remain in effect for a period of years so that they may adjust themselves to the new conditions, and conduct their affairs without the turmoil of never ending rate cases.

- 88 In the *Lincoln Gas & Electric Co. v. The City of Lincoln*, (250 U. S. 256), it appeared that the action was instituted in 1906, before the \$1.00 rate, fixed by the city of Lincoln, had been tested. In the Trial Court the bill was dismissed without prejudice to the commencement of a new action. An appeal was taken to the United States Supreme Court where the decree was reversed and the cause remanded to the District Court with direction to refer it to a Master with leave to submit additional evidence (223 U. S. 349). Accordingly, a Master was appointed and he made a report in September, 1914, finding that the rate ordinance was not confiscatory. Upon the rehearing before the Master, he considered a

period from 1906 to substantially the time of his report, which was in 1914, approximately *eight* years. Mr. Justice Pitney, in writing for this Court in that case said (p. 268):

"Without going into details, we content ourselves with announcing our general conclusion, that, having regard to the entire period under investigation, we are unable to say that the Master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912, the net return was close to the line, if not below it; but that in other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test." 93

The United States Supreme Court dismissed the bill, but without prejudice to the commencement of a new action to restrain the enforcement of the ordinance in question, if it should result after a practical test of \$1.00 rate since May 1, 1915, that complainant did not obtain a return which was compensatory. 94

The case of *Boyle v. St. Louis S. F. R. R. Co.*, 222 Fed. Rep. 539, p. 557, was a confiscatory case and the Court there investigated a rate for passenger fares of two cents a mile, fixed by the State Railroad Commission of the State of Arkansas. The opinion was written by District Judge Traiver, and in the course of which he said:

"By adopting the *four-year* period for averaging the earnings and expenses, we are able to get a fairer result than by merely selecting one year which may be affected by

96 peculiar conditions then prevailing. A four-year period when the years are fairly normal will reflect more accurately the traffic and cost" (p. 557).

97 In the case of *Darnell v. Edwards*, 244 U. S. 561, the Supreme Court had under consideration maximum rates on logs fixed by the Mississippi Railroad Commission. The attack upon rates fixed by the Commission was that they were so low as to be confiscatory. In the course of the opinion of the Court, Mr. Justice Pitney said (p. 569):

98 "It is well established that in a question of rate making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. Besides this there was affirmative evidence before the district court to the effect that the rates were reasonable. The evidence for complainant tending to show that they were non-remunerative, while based upon actual experience in the operation of the road, *not relates to only a brief period when conditions were abnormal* * * *."

99 And in concluding his opinion, he further said:

100 "But it is sufficient for the present to say that the experimental period was too brief * * * and conditions during the entire period covered by the testimony have been too abnormal to enable us to say that the Commission's rates are confiscatory."

The period under consideration in the above case was from September 10, 1913, to March 31, 1914.

In the case of *Stevenson v. Great Northern Railway Co.*, 72 N. W. Repr. 713, 721, the Court said:

"If the Great Northern Company has made such large profits in the past that it was able to pay over large dividends and still accumulate such large amounts of surplus to invest in its properties or to carry along for several years, it should be content to go along with smaller profits in such times of financial stringency as existed in 1894."

In the often quoted case of *Smyth v. Ames*, 169 U. S. 466, 546, this Court said:

"As said in the case last cited, 'Each case must depend upon its special facts and when a court without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety so unjust as to destroy the value of its property for all the purposes for which it was required, its duty is to take into consideration the interest both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has under the guise of regulating rates exceeded its constitutional authority and practically deprived the owner of property without due process of law. * * * The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public.'"

106 The first case to arise in the State Courts of the State of New York, in which the abnormal years caused by the world war were considered was the case of *Kings County Lighting Company v. Lewis*, 110 Misc. Rep. 204.

As was said by Mr. Justice Greenbaum in that case (p. 242):

107 "It is clear that confiscation may not be predicated upon the operations of the plaintiff for 1916 and 1917. As to the years 1917 and 1918, it must at the outset be said that those years were abnormal owing to the war conditions then existing. Notwithstanding this abnormality the year 1917 showed a fair return at an eighty cent rate. * * *

108 As to the year 1918, the question that confronts one is whether confiscation should be based upon such a year, even if it be established with reasonable certainty that the plaintiff's income was thereby reduced to a point which concededly would not be ordinarily deemed an adequate return upon the capital invested. * * *

109 The operations of a fiscal year which was as abnormal as was the year 1918, lack the value of a normal year in determining the future.

110 In this connection it will be instructive to study the opinions of the courts as to what is meant by a fair return and what period of time should be taken into account in determining the fair return and to what extent abnormal conditions may affect the question of the indemnity of return."

A recent case to arise in the District Court Southern District of the State of New York was the case of the *Consolidated Gas Co. v. Newton*

et al., 267 Fed. Rep. 231. The opinion of Judge Hand in that case was written in August, 1920. He states:

"The master has taken complete evidence over a period of twenty months, from January first, nineteen hundred and eighteen, to August thirty-first, nineteen nineteen. Since that time eleven months have passed, during which there has been no fall in price levels. The record has some evidence of this down to a later day, but, of course, not down to the date of this opinion. But evidence is not necessary in the face of so patent and obtrusive a fact of daily life, and it is quite fair to say that the conditions which the master found as of August thirty-one, nineteen hundred nineteen, has been aggravated during the succeeding year. The period despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production, and the 'rate base' for a future time long enough to call for some judicial action" (p. 236).

The reason for adopting this period as a test of the statute is clearly set forth by the learned Judge, for he states (p. 234):

"either the evidence of the last 3 years is sufficient basis for a *forecast*, or it is not. If not, ante-bellum values should be used merely for the lack of any better; if so, the average of the last 3 years is the proper basis."

Here we have an expression of opinion by the Court that the average over a period of three years is the proper test, where such a period indicates the future trend of prices.

116 Again he says:

"It is quite true that if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet, and the lean years with the fat. Rates, when established, are not intended to make a nice adjustment to all ensuing conditions; they are too long and costly to fix, especially in court" (p. 234).

117 It is clear from a careful reading of the decision that the learned Judge had the impression, as had Special Master Gilbert, that we had entered into a period of permanent high prices, for he says:

"Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of my prophecy" (p. 234).

119 He then proceeds to point out certain reasons which to his mind justifies his conclusions in this regard.

At the time of the decision of Judge Hand, there had been no marked fall in price levels apparent to him, while in the instant case, a precipitate decline in price levels has taken place of which this Court will undoubtedly take judicial notice.

The period of time proper for a test of the statute might be different in a case where price levels are not falling, but advancing, during a normal period, from a case where the price levels

were declining precipitately. In any case but in ¹²¹ this case in particular a much longer period should be selected to make a proper test, and not simply a short period during an unusual upheaval of prices.

There is an abundance of evidence in our everyday life aside from the sworn testimony that commodity prices are on the downward trend and ¹²² have been so since the fall of 1920, and as Judge Hand remarked:

"Evidence is not necessary in the face of so patent and obtrusive a fact of daily life" (p. 236).

The price trend of the two well-known mercantile houses of world-wide reputation, Dun's and Bradstreet's, show in graphic form what every man learns when purchasing commodities for his home. A recent report shows that the price levels of general commodities have declined about 48 per cent from the high mark of February 1, 1920. The descent in prices, like their rise, has been the ¹²³ greatest, in the given time, that the world has ever known.

The next case to arise in this same Federal Judicial District was the case of *Kings County Lighting Co. v. Nixon et al.*, 268 Fed. Rep. 143, decided by Judge Hough on October 13, 1920.

The learned Judge did not follow the rule laid ¹²⁵ down by Judge Hand in the Consolidated Gas case that "the average of the last three years is the proper basis" where "the evidence of the last three years is a sufficient basis for a forecast,"

126 but disregarding the question of an average over a period of years, remarks:

"The point is that the 80-cent rate is confiscatory not because it does not yield a sufficient percentage on capital, but because to produce it at that price, consumes capital. Neither the Wilcox case nor any other decision can be cited to show that any definite or fixed period of experimentation is a necessary prerequisite to a suit of that kind. If plaintiff were getting any return at all another question might be presented, but it is to me a matter of no doubt whatever that a year and a half is a long enough time to experiment with proved capital losses before applying for relief."

128 Thus, the rule stated by Judge Hand that an average of three years is the proper test, was held not to apply in a case where capital is actually consumed during a year and a half, and no return at all enjoyed.

129 It should be noted in this connection that the Kings County Lighting Company, never having operated under the rate, never experienced proved capital losses thereunder and that is here on appeal.

When the Master's report in the instant case came before Judge Mayer for review on this important point (p. 110), the learned Judge said:

130 "The year, 1919, is, in this case, 'a sufficient basis for the calculation of the cost of production and the 'rate base' for a future long enough to call for some judicial action.'

"*Municipal Gas Co. v. Public Service Com.*, 225 N. Y. 89; *Consolidated Gas Co. v. Newton et al.*, 267 Fed. Rep. 231; *Kings County Lighting Co. v. Nixon et al.*, 268 Fed. Rep. 143.

"The opinions of Judge Cardozo, Judge Learned Hand and Judge Hough, in the cases just cited, fully set forth the reason for this conclusion and with those reasons on this point I am in full accord."¹³¹

In this case, Judge Mayer found that in 1919 the net cost of gas delivered was 1.29 cents per M., in excess of the statutory rate.¹³²

This decision, likewise, does not follow the rule laid down by Judge Hand that an average of three years is the proper test, but holds that the rate is confiscatory where a slight loss occurs during one year.

The application of the rule of Judge Hand in the Consolidated Gas Co. case—an average of three years—if applied in the instant case would have shown a fair return on the Court's own figures, but the decision was based on one year alone.

The prediction that the trend of prices of all commodities was sharply upward, contrary to the actual fact of a precipitate decline, which has actually happened, probably influenced the court in all the cases just cited.¹³³

In the case of the *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, which case arose on demurrer and consequently the only question before the court was the adequacy of a pleading, Judge Cardozo remarked:¹³⁴

"That dearth does not signify confiscation unless unreasonably prolonged, may be assumed to be true (citing *Darnell v. Edwards*, 244 U. S. 564). The difficult thing is to determine where the line is to be drawn" (p. 98).

136 In the *Kings County Lighting Company* case (supra) and in the instant case, the Court seems to adopt the rule that where a deficit resulted under the statutory rate, for a year and a half or even a year, such a period was sufficient and the statute confiscatory.

137 This rule does not seem to us to be sound. The statute might be declared confiscatory where an inadequate return is had, as well as where no return or a deficit results. The period of experimentation is not affected by this fact and the proper period is alike in both instances.

138 Imagine a test for a five-year period with an inadequate return on capital each year, and another five-year period with a deficit for two years, but an average of 8 per cent return for the full five-year period. The Court would surely be more inclined to hold the rate confiscatory during the first case, than during the latter.

139 As Judge Cardozo remarks in the case of *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89:

"Fleeting losses may be suffered, and yet the balance sheet may show a profit."

140 On the other hand, substantial profits may be made for a large part of any period and the balance sheet may show a slight deficit. Is it sound to hold that a dearth shown by a balance sheet at the end of one year but not unreasonably prolonged, is confiscation?

The question of a proper period for a test has not been presented to the Court of Appeals, but the decision in the Municipal Gas Company and

other cases would indicate that when the question **141** is presented for decision the rule will be adopted that an average over a period of years is the proper test. Many decisions indicate that this will be the rule.

In the case of *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479, Judge Miller says (page 487):

"The investors in a new enterprise have to be satisfied as a rule with meagre or no returns, while the business is being built up. In a business subject only to the natural laws of trade, they expect to make up for the early lean years, by large profits later. *In a business, classified among public callings, the rate making power must allow for the losses during the lean years, or their rate will be confiscatory,* and of course will drive investors from the field. In the former class the value of the established business is a part of the 'good will' and may be determined by taking a given number of years purchase of the profits, or exchange value may be considered. In the latter case a different rule must be **142** adopted."

Judge Miller, by the above language, could have meant but one thing; that is, that the rate should be so fixed that the returns in fat years would care for the losses during the lean years. There is no way to accomplish this, but by averaging the returns **143** over a period of years or by taking into consideration the reserves or accumulations of the company.

While this Court has not decided this issue squarely in a confiscatory case, the trend of the

146 decisions in kindred cases, leads to our view upon this important point.

Boyle v. St. Louis R. R. Co., 222 Fed. Rep. 539.

Darnell v. Edwards, 244 U. S. 564.

Steinerson v. Great Northern Ry. Co., 72 N. W. Rep. 713.

147 *Lincoln Gas & Electric Co. v. City of Lincoln*, 250 U. S. 256.

Columbus Railway Power & L. Co. v. City of Columbus, 249 U. S. 399.

It is well settled that had the respondent entered into a contract in the year 1906 with the **148** City of Flushing to deliver gas for \$1.00 per thousand cubic feet, the proper period to test the constitutionality of such a contract would be the whole term of the contract.

Columbus Railway Power & L. Co. v. City of Columbus (supra).

149 *City of Knoxville Gas Co. v. Knoxville Water Co.*, 261 Fed. Rep. 283.

Is there such a marked distinction between a contract fixing rates and a statute fixing rates, that in the one case the whole term of the contract is the proper period for a test, while in the other, a test taken during one or two abnormal years suffices? We believe the period of experimentation is alike in both cases and that this **150** Court will adopt such a rule.

In the case of *Bronx Gas and Electric Co. v. City of New York*, 195 App. Div. 554, where the Appellate Division, First Department, had before

it the question as to whether it was proper to 151 order a reference in a gas confiscatory case, Mr. Justice Page said (p. 3):

"The acts which it is sought to have declared unconstitutional were passed 15 and 16 years ago. *The practical experience of the company under these acts up to January 1st, 1917, taking into consideration the changes that would be occasioned by the increase in the cost of materials and labor will be the determining factors in the case.*" 152

In the light of these authorities we submit that under the circumstances of this case, the shortest period which will reflect with any reasonable accuracy the return respondent has enjoyed under 153 the statutory rate is not less than the period during which the statute was in operation, viz: 1906 to 1919, inclusive.

POINT III

RESPONDENT HAS ACCUMULATED A FUND AMOUNTING TO \$101,149.66 AS A CONTINGENCY 154 RESERVE. THE STATUTE SHOULD NOT BE DECLARED CONFISCATORY UNTIL THIS FUND IS EXHAUSTED. TEMPORARY LOSSES DUE TO ABNORMAL CONDITIONS, LIKE ANY OTHER HAZARDS OF BUSINESS, SHOULD BE DEBITED AGAINST IT.

The respondent prior to November 16, 1915, 155 carried a reserve account designated as "Accrued Amortization." The balance in the last named account amounting to \$62,254.82 was then transferred to a new account called "Contingency," (Ex. A9, p. 2808.)

156 This transfer was done in pursuance to a resolution passed by the board of directors of respondent at their meeting on Tuesday, November 16, 1915.

It reads:

"On motion, duly seconded, it was

157 Resolved: That the title of the account heretofore designated as Accrued Amortization, be from and after December 13, 1914, designated as Contingency, and that, for each month thereafter, there shall be credited thereto and charged to operating expenses an amount equal to five (5c) cents per thousand cubic feet of gas sold during said month, for the purpose of providing for contingencies or casualties, such as those caused by fire, flood, earthquake, insurrection or riot, or *any other hazards*; no charge against said Contingency Account nor any appropriations therefrom to be made, except by authority of the board of directors. (pp. 719.)

159 During the years 1915, 1916 and 1917 when the account was active, respondent charged its consumers 5 cents per thousand cubic feet of gas sold to produce this contingency reserve. (p. 777.)

On December 31, 1919, the balance sheet of the respondent shows that the amount in the so-called "contingency" account was \$101,149.66. (Ex. A9, p. 2808.)

160 Mr. Raynor, the secretary of respondent, testified as follows, regarding this fund:

"Q. Is it fair to say of your testimony, Mr. Raynor, that the company now has on hand to the credit of Reserve Contingency the sum of \$101,000 odd? A. It is.

161

"Q. And that is on hand? A. Yes.
 "Q. And to be accounted for by the company? A. Yes" (p. 778).

"Contingency" is defined in Bouvier's Law Dictionary, Rawles Edition (p. 421) as

"The quality of being contingent or casual; the possibility of coming to pass; an event which may occur (Webster). It is a fortuitous event which comes without design, foresight or expectation (39 Barb. 272)."

A contingent fund is an amount reserved or set aside with which to meet specific exigencies and unforeseen events which may or may not happen. 163
 The purpose as disclosed by the company of the fund was to provide "for contingencies or casualties such as those caused by fire, flood and earthquake, insurrections or riot, or *any other hazard*." Whether the account is now in cash or whatever form, it does not appear, nor does it matter. If it is to be used for the purposes set forth in the resolution it must be in some available form. Such a large fund should be kept invested and not be allowed to remain idle. If invested in the plant, such betterments could be capitalized when necessary.

The sole question to determine is whether the temporary losses due to abnormal conditions is properly chargeable against this contingent fund 165 the same as any other hazard of respondent's business.

The appellants contend that this is one of the objects of this reserve. The resolution of the board of trustees is broad and sweeping and covers unusual happenings, some extremely

166 improbable, such as flood, fire, earthquake, insurrections and riots and any other hazard, other than those defined, are intended to be covered and to be taken care of by this reserve. Surely the consequences resulting from the Great War followed by the enormous inflation, labor disorders, and unsettled conditions are hazards encountered by every business and are provided for, as every unforeseen event by suitable reserve or by contingent reserve funds.

167 When the fund was being accumulated, of course, the respondent did not know that the World War would take place, but, as we have stated, it is obvious that the fund was amassed for the purpose of taking care of unforeseen events and exigencies not then fairly contemplated. There is no evidence that the fund has ever been drawn upon by the company to take care of any of the contingencies specifically mentioned in the resolution. A similar contingent fund was considered by Special Master Graham in the case of the *Brooklyn Union Gas Company v. Nixon, et al.*, and the contention here made by the appellants was advanced in that case. The Special Master did not express an opinion on this question, but charged the contingent fund with the sum of \$150,000, being a portion of an extraordinary expense due to a strike at the plant of the Brooklyn Union Gas

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

209

210

211

212

213

214

215

216

217

218

219

220

221

222

223

224

225

226

227

228

229

230

231

232

233

234

235

236

237

238

239

240

241

242

243

244

245

246

247

248

249

250

251

252

253

254

255

256

257

258

259

260

261

262

263

264

265

266

267

268

269

270

271

272

273

274

275

276

277

278

279

280

281

282

283

284

285

286

287

288

289

290

291

292

293

294

295

296

297

298

299

300

301

302

303

304

305

306

307

308

309

310

311

312

313

314

315

316

317

318

319

320

321

322

323

324

325

326

327

328

329

330

331

332

333

334

335

336

337

338

339

340

341

342

343

344

345

346

347

348

349

350

351

352

353

354

355

356

357

358

359

360

361

362

363

364

365

366

367

368

369

370

371

372

373

374

375

376

377

378

379

380

381

382

383

384

385

386

387

388

389

390

391

392

393

394

395

396

397

398

399

400

401

402

403

404

405

406

407

408

409

410

411

412

413

414

415

416

417

418

419

420

421

422

423

424

425

426

427

428

429

430

431

432

433

434

435

436

437

438

439

440

441

442

443

444

445

446

447

448

449

450

451

452

453

454

455

456

457

458

459

460

461

462

463

464

465

466

467

468

469

470

471

472

473

474

475

476

477

478

479

480

481

482

483

484

485

486

487

488

489

490

491

492

493

494

495

496

497

498

499

500

501

502

503

504

505

506

507

508

509

510

511

512

513

514

515

516

517

518

519

520

521

522

he well contended that it should now be utilized to carry complainant over a confiscatory period. This so-called fund, however, does not exist as cash. It has gone into the property in one form or another. That dividends have been paid in the past does not produce a cash fund in the present."¹⁷¹

Brooklyn Union Gas Co. v. Nixon et al., (not reported).¹⁷²

It would seem, therefore, that the learned Judge adopted the contention made by the appellants that it was proper that this fund be now utilized to carry respondent over a confiscatory period but failed to apply the rule because it was not shown that the fund existed in actual cash. We submit that this was immaterial and was not a reason for the nonapplication of the rule for the fund must be in some available form to carry out the intended purposes, as shown by the resolution of the board of trustees.¹⁷³

It is not clear why the learned Judge should approve the action of the Special Master in drawing upon this fund for the expense occasioned by the strike and still refuse to charge against this fund the temporary losses due to the abnormal conditions. He said it could not be used to take care of abnormal conditions, because not in cash — yet he draws upon it for a strike — the inconsistency of his position is apparent.¹⁷⁴

As we have already stated, there is no evidence whatever that this sum has been spent for capital purposes, extensions, betterments or anything else; but for the purpose of argument assume that it has been so spent for one of the above purposes mentioned.¹⁷⁵

176 One of two things must be true — either:

(a) The property in existence before the accumulation of this fund was actually worth the value of the capital issued against it and was kept up out of the earnings in accordance with law, in which case the betterments now representing the contingent fund would have no capital issued

177 against them but the same should now be capitalized and the moneys used for contingencies; or

(b) The property in existence before the accumulation of this fund was not worth the capital issued against it, in which case \$101,149.66 of betterments representing this fund would readily go to drive out watered capital, and there would be nothing to capitalize.

178 In either case the consumers should not be made to suffer for the over-capitalization of respondent prior to the accumulation of the fund.

The claim is made that the statutory rate fell short during the year 1919 of affording respondent a fair return on the fair value of its property used in the gas business. Our contention is that

179 the stockholders have, through their constituted officers, accumulated this fund for the purpose of taking care of exigencies and abnormal situations such as this. Consequently, as soon as it appeared that the return fell short of what the company considered a fair return, then the company should have treated this fund as a means of

180 making up the loss, and in no event could the statute be declared confiscatory until it was shown that the fund was exhausted in making up such losses.

The fund was in the nature of insurance, created out of the rate charged the consumer,

to be used in any emergency, and so long as the 181 consumers provided the company with this insurance, it is improper to make them pay again for the losses. In other words, if the rule for which we are contending is not adopted then the consumers would be made to pay twice for the failure of a declared return during the abnormal periods prevailing in 1919.

182

Such a condition condemns itself and is contrary to fair dealing. The company may not thus enrich itself at the expense of the consumers. The only burden which the consumers must bear is to see to it that they pay a rate which will give the company a fair return; and if they pay more than is necessary in fat years, and the difference 183 is accumulated in an insurance fund, such as here, then they have discharged their full duty to the company and the fund must respond to make up any inadequacy of return. Otherwise, the amount paid by the company to consumers in prior years when the fund was accumulating, was too large 184 to the extent of the amount taken out to create this fund. What we mean to say is that the rate at that time was grossly exorbitant unless the consumers were engaged in setting aside a reserve or insurance fund to take care of the day when the company might meet a condition such as confronted it in 1919.

Assuming for the purpose of argument only 185 that the fair value of the company's property and the rate of return it was entitled to enjoy was correctly set forth by the learned Judge below, it will be readily seen that this fund was large enough to carry the company over a period

186 of several years without changing the statutory rate and without any income for making and selling gas for such period.

But aside and apart from this we have shown that respondent enjoyed a fair return throughout.

187

POINT IV

RESPONDENT EARNED A FAIR RETURN IN THE YEAR 1919.

The Court below found the cost of production and distribution of gas in this year to be \$1,0129 or 1.29 cents in excess of the statutory rate (p. 112).

188 The items making up this cost found by the Court are as follows:

Cost of production per M.....	63.45 cents (p. 111)
Unaccounted for gas per M....	7.45 cents (p. 111)

Total per M.....	70.90 cents
------------------	-------------

Cost of distribution per M....	27.07 cents (p. 112)
--------------------------------	----------------------

189 Replacements per M..... 3.00 cents (p. 112)

Taxes per M.....	7.07 cents (p. 112)
------------------	---------------------

Total per M.....	37.14 cents
------------------	-------------

.....	108.04 cents
-------	--------------

Misc. revenue per M (p. 112).....	6.75 cents
-----------------------------------	------------

Net cost per M found by Court (p. 112).....	101.29 cents
---	--------------

190

It will be seen that the Court below, accepted the figures given for the cost of production in Complainant's Exhibit No. 64 (pp. 1569, 1570). This exhibit shows the cost of production as 63.45 cents per thousand cubic feet.

(A.) *The Court and the Master erred in not crediting to cost of operation at least 5.88 cents per thousand cubic feet or \$19,770.01 because of excessive "repairs at works."*¹⁹¹

The Court below, as we have stated, accepted the figures given by respondent for the year 1919 alone for cost of production (Ex. 64, pp. 1569-1570).¹⁹²

Both the Court and the Master overlooked the fact that repairs at the works was abnormal and unusual as compared with other years.

On this Exhibit there appears two items:

	Amount	Cost per M cubic feet	
Repair labor	\$10,101.99	.0266 cents	193
Repair material	17,843.55	.0469 cents	
<hr/>			.0735 cents

These amounts expended are unusually large for the year 1919 as compared with earlier years and far more than a normal cost for such items. This is conclusively shown by Complainant's Exhibit 77 (p. 1596) and testimony relating to it given by respondent's Engineer Mr. Woods.¹⁹⁴

This Exhibit, introduced by Respondent, shows the following:

	Total cost per million	Cost in cents per M cubic feet	
Repair labor	\$23.00	2.30	195
Repair material	30.00	3.00	
<hr/>			
Total	\$63.00	5.30 (p. 1596)	

196 In other words, Mr. Woods expressed the opinion, that for a fair operating condition, .0530 cents ought to be sufficient, instead of .0735 cents, as shown by said Exhibit 64.

Mr. Woods' testimony condemns such a large amount for repairs as excessive.

He stated:

197 "The Master: Or, putting it another way, you believe the cost of repair labor should show as a matter of actual operation about \$23 a thousand?

The Witness: \$23 a day, or 23 cents a thousand" (p. 420).

198 And again:

"Q. First as to repair materials, have you figured what in your judgment the repair material required for such a plant would cost per thousand? A. Yes, 3 cents per thousand" (p. 421).

199 The Court below, though he concluded that "the estimate of an expert like Mr. Woods is valuable" (p. 111) and accepted his judgment as to unaccounted for gas, failed to accept his estimate on the above items. Had the Court done so, he would have found, that the cost of production should have been reduced by .0205 cents (.0735 — .0530) or that the cost of production instead of being 63.45 cents should be according to respondent's engineer 61.40 cents.

The Master, upon the trial however, thought that 3 cents for the repair material item was too liberal as will be seen (pp. 450, 451) for upon cross-examination Mr. Woods was confronted with

his testimony in the Consolidated case wherein he allowed for this item $1\frac{1}{2}$ cents per thousand cubic feet (p. 449). In fact, the Master stated that he thought that figure of 3 cents should be cut down (pp. 450-451). The difference there was accounted for by the witness Wood by stating that it was due to capacity. Here again the court's attention should be called to the fact that Exhibit 116 (p. 1727) produced by the respondent of its gas manufactured and sold in the year 1920 shows an actual increase for the same period in 1919 about 28%.

The Master evidently was impressed that the figure of 3 cents was too high and he took the witness Wood in hand and the following examination by the Master appears (pp. 450-451),

"BY THE MASTER:

"Q. Is it possible, Mr. Woods, that this repair material for 1919 included material put in stock, that would make that difference in your estimate of 3 cents in the actual cost of 4.69, according to the record? A. Well, I would not say. They may have bought material charged to repair account, and it may be in stock pending the use of it.

"Q. Yes? A. I would not say, that might be so.

"Q. In arriving at what the fair cost of production would be for one year I ought to have that in mind. A. I do not know that that is the case.

"Q. That is, taking into consideration your statement that you think 3 cents is right, and your testimony in the other case or your statement today that $1\frac{1}{4}$ would be right for the Consolidated, for a larger plant, as compared with 4.69, it would indicate put-

201

202

203

204

205

206 ting in an additional supply, would it not, or a reckless expenditure of money, either one? A. Their cost may have been somewhat lower the year before, or there may have been more extensive repairs in 1918 than in 1919."

207 " * * * The Master * * * I think I have got to shave this. You have iron mass, and repair material that seemed to be higher and would indicate putting in of stock."

The master as usual failed to adjust this item as he indicated he would do on the trial.

208 The books of the company indicate that in the year 1919 the increase of repairs over the year 1918 is about 300%. This shows either one of two things; that the repairs were unusual or abnormal by reason of the fact that they had allowed repairs of previous years to accumulate and had made them all in the year 1919, or that they had deliberately padded this item. The testimony of Mr. Spear on that point is quite interesting and he in part concedes that the repairs for the year 1919 were unusual (pp. 694-695).

209 " Q. Mr. Spear, was the year 1919 one unusual with reference to repairs, so far as your company is concerned? In other words, did you do a lot of repairing in the year 1919? A. We did considerable repairing in 1919.

" Q. More so than in any previous year? A. I wouldn't say that.

210 " Q. Well, comparing it with 1918? A. We may not have done so much in 1918 on account of war conditions, not being able to get materials, and had to make up for it in 1919.

" Q. How about 1917? A. That same condition existed.

" Q. How about 1916? A. Well, I can't recall what work we did as far back as that.

"Q. It is fair to say, is it not, that you 211 left a number of repairs to accumulate and that you made them in 1919, which you contend is the first year you were able to make them in? A. No; I say it might have been that way.

"Q. Let me call your attention to some of the items here, perhaps this may refresh your recollection: In the year 1918, repairs 212 of works and station structures, labor \$200,56; 1919, \$636,52. Do you recall any of those figures? A. I don't recall the exact figures; no. You want to realize this condition, too, Mr. Neumann, that we paint our holders about every three years. In the meantime it might be necessary to paint part of it so that it might come heavier in one year than in another. You can't take repairs—*you can't take an average in any one year.*

"Q. That is, repairs taken for one year would not be a criterion of the general average of repairs over a period of years? A. Not necessarily.

"Q. That is what I am trying to get at. Take, for instance, the item of repairs to gas apparatus, under materials, in the year 1918, there was \$4,020.81 spent; and in the year 1919 \$12,891.89. How do you account for that? A. Well, I can't recall the details because I haven't gone into it; some of that might be due to increase in cost of materials.

"Q. But the increase in cost wouldn't be 300 per cent? A. Oh, no.

"Q. So that it can only be explained upon the ground that there were more repairs to gas apparatus in the year 1919 than in the previous years by about 300 per cent? A. I would say that is part of the explanation;

213

214

215

216 part of it is more repairs, and the other part would be increase in cost.

"Q. Take repairs to gas apparatus and labor, the amount in 1918 is \$3,528.06; and in 1919, \$6,327.79. A. That same condition would apply there, due to increase in labor as well as materials.

217 "Q. And finally going to the totals of repairs of all kinds, in the year 1918 it was \$14,326.84; and in the year 1919, \$33,642.56; how do you account for that? A. Only in two ways, that the work done in 1919 was more than in 1918, and also in the increase in cost of labor and materials.

"Q. By reason of the fact that repairs were allowed to accumulate? A. Well, I wouldn't say that.

218 "The Master: Well, do you mean the repairs were allowed to accumulate or that they might not have been necessary?

"Mr. Newmann: Either one.

"The Witness: Yes, or it might not have been necessary to make repairs in 1918, but I would say that there was some accumulation there, in my recollection of it."

219 The following table will show at a glance the amount expended according to the books by respondent for various items comprising repairs at works, 1914, to 1919, inclusive.

Appellants contend that because of the abnormality of 1919 and the apparent excessive
 220 repairs for that year the expenditures for this work, should be averaged over a period of years, and in this case such period should be at least five years. Accordingly, in the second half of the table which follows we have averaged such repairs for the years of 1914 to 1918, inclusive.

and also for the purpose of comparison averaged **221** same for the period 1914 to 1919, inclusive. We have then showed by figures the saving in dollars to respondent in 1919 had the court adopted an average for these repairs over the five year period. There would therefore have been a saving, as shown by the table, of 5.88 cents per thousand for gas sold had the court adopted the **222** average five year of 1914 to 1918, inclusive, or 4.90 cents per thousand cubic feet had the court adopted the six year period which included the unusual year of 1919.

Table Showing Repairs of Works

	1914	1915	1916	1917	1918
Repairs of works and station structures	\$2,538.82	\$2,177.57	\$1,998.19	\$1,574.69	\$2,074.18
Repairs of power plant	1,425.43	3,119.92	1,510.75	2,025.77	3,352.88
Repairs gas apparatus	2,318.00	3,099.72	4,328.86	4,823.91	7,748.87
Repairs works tools	95.41	193.42	269.53	211.84	401.75
Total	\$1,407.69	\$6,320.83	\$7,433.34	\$8,299.67	\$12,626.19

	1914	1915	1916	1917	1918
--	------	------	------	------	------

	Average 1914-1918	Average 1914-1919	Saving in 1919 by using the average for 1914-1918	Saving in 1919 by using the average for 1914-1919
Repairs of works and station structures	\$1,602.68	\$1,856.26	\$981.50	\$817.92
Repairs of power plant	1,788.95	2,435.41	6,878.76	3,232.30
Repairs of gas apparatus	4,429.87	6,891.84	14,789.84	12,324.84
Repairs of works tools	264.03	269.02	119.91	111.95
Total	\$8,173.63	\$11,757.03	\$19,770.01	\$10,496.01

Cents per thousand while last of gas set 1,000 ft. of gas consumed.

5.88
4.96

There was no explanation offered by the respondent of this unusual increase in the year 1919 over other years, and here again we say that in that respect, at least, the year for this company was abnormal. It must have either made repairs neglected in previous years or it must have inflated its works repair account for that year, because the increase is over 100 per cent and the record is quite replete with statements that the increase in price was nowhere near that amount over the previous year.

There should be deducted for this item 5.88 cents per M, or \$19,770.01.

(B.) *The court and the master erred in not crediting the cost of distribution at least 1.47 cents per M cubic feet, or \$4,962.54, because of excessive repairs in the transmission and distribution system.*

The appellants contend that cost of repairs of all kinds should be averaged over a period of years.

The reasoning of District Judge Tavier in the case of *Boyle v. St. Louis S. F. R. R. Co., supra*, that

"By adopting the *four-year* period for averaging the earnings and expenses, we are able to get a fairer result than by merely selecting one year which may be affected by peculiar conditions then prevailing"

applies with special force to the expenditures for all repair items, for these items are variable depending upon many conditions, such as weather, care, extent of use and others.

During a severe winter such as the winter of 1919-1920, the operating expenses are largely

236 increased because of the excessive amounts of coal used, the additional expense attending the many calls from consumers having trouble with their appliances and an increased unaccounted for gas due to the greater condensation.

Repairs to mains, services and meters vary considerably from year to year; one year due to some unusual and abnormal condition, the item **237** will be unusually large and the following year, the same item will be comparatively smaller. The repairs are expensive and when once made do not recur for a period of years.

The following table gives the amount expended, according to the books, by respondent for repairs in the transmission and distribution system. **238** What we have said in regard to the averaging of repair at the works applies to these repairs, and same should be averaged over a period of at least five years. The table below shows the average of such repairs for the years of 1914 to 1918, inclusive, and the same for the period of 1914 to 1919, inclusive. The table further shows a saving **239** in dollars to respondent in 1919, had the court adopted for this item, an average period of five years. Thus there is a saving, as shown by the table, of 1.47 cents per M for gas sold for the five year period of 1914 to 1918, and a saving of 1.23 cents per thousand had the court adopted the six year period, from 1914 to 1919, inclusive.

Repairs of Transmission and Distribution System

	1914	1915	1916	1917	1918	1919
Repairs of gas mains	\$3,744.97	\$1,548.42	\$1,453.28	\$1,801.40	\$1,649.65	\$5,497.02
Repairs services	340.71	167.89	173.93	180.43	652.88	849.35
Repairs meters	2,862.46	3,536.82	1,435.32	5,763.91	3,952.42	4,571.28
Total	\$6,948.14	\$5,253.13	\$5,664.53	\$6,164.84	\$6,004.95	\$11,077.65

51

	Average 1914-1918	Average 1914-1919	Saving in 1919 by using the average for 1914-1919
Repairs of gas mains	\$1,481.36	\$2,600.63	\$3,715.66
Repairs services	523.57	481.87	385.78
Repairs meters	3,710.18	3,873.87	861.10
Total	\$6,115.11	\$6,911.37	\$4,902.74

Cents per thousand cubic foot of gas sold
1.47 1.23

(Def. Ex. A 15, p. 17(i))

241

242

243

244

245

246 There should be deducted for this item 1.47 cents per M, or \$4,962.54, or a like credit to the cost of distribution.

(C) *The Court should have found that 7% or 5.71 cents per thousand cubic feet was a reasonable allowance for unaccounted for gas. This would be a credit to cost of operation of \$5,749.54.*

247 The Special Master allowed 11.03% for the year 1919 or 8.28 cents per thousand cubic feet (p. 51) while the court reduced it to 10%, or 7.45 cents per thousand cubic feet (p. 111).

248 The loss of gas, called unaccounted for gas, is a variable quantity depending to a great extent upon the weather conditions, care and attention of the management. It is impossible to determine what the loss will be in advance of its disappearance. One year it may be surprisingly large, and the next comparatively small. There is no question however, but what long cold and severe winters such as the winters of 1917-1918 and 1919-1920, affects the condensation of the gas and causes a greater loss than usual; and on the other hand, the mild winter of 1920-1921, which we have just experienced, will undoubtedly result in a much smaller loss.

The Master states

250 "there is ample evidence in the case indicating that it is practically impossible to regulate the amount of 'unaccounted-for' gas and that factors were operative in 1919 which tended to increase the percentage. Weather and other conditions affect the gas in such manner and form that it is impossible to say that 'unaccounted-for' gas should be kept below a certain percentage.

Some years it seems to run very high, and in other years it seems to run quite low. This 251 variance is caused by a number of changing conditions" (p. 51).

The Master accepted the actual loss as shown on the books of respondent for that one unusual and abnormal year, viz., 11.03% (p. 51).

Appellants contended on the trial and we make the contention now, that a fairer and more just method of determining the amount of this loss is by taking the average loss over a period of years, for surely what the loss will be is best determined by what it has been in the past.

The unaccounted for gas, of respondent expressed in cents per thousand feet, according to 253 its books, is as follows:

Year.		
1909.....	5.67	
1910.....	6.62	
1911.....	6.03	
1912.....	6.25	
1913.....	6.79	254
1914.....	5.97	
1915.....	6.32	
1916.....	4.40	
1917.....	4.11	
1918.....	5.27	
1919.....	8.27	
(Defts. Ex. A 13, p. 2812.)		255

The increase in 1919 over the year 1918 will be seen to be 3 cents per thousand, and in the record there is no satisfactory explanation of this large increase.

5
3

256 The average for a ten year period, 1909 to 1918, inclusive, is 5.74 cents, and this appellants contend, should be the amount allowed, instead of 7.45 cents allowed by the Court below.

When the report of the Master came before Judge Mayer in the Court below for review, he stated

257 "The 'unaccounted for' gas, so called, for 1919, was 11.03 per cent. This percentage varies. Some years it may be more, others less. Therefore, the estimate of an expert like Mr. Woods is valuable. This plant in his opinion should show a loss of about 10 per cent and I accept that figure, for the purposes of this case, instead of 11.03 per cent" (p. 111).

258 "My figure of 10% instead of the Master's 11.03% changes the \$28 cents to 7.45 cents" (p. 111).

Mr. Woods is the Assistant Engineer of manufacture of the Consolidated Gas Company, and
259 Consulting Engineer of the respondent and was a witness much interested in the success of this litigation.

260 The Court below should, in all fairness have adopted the figure showing the average loss of gas as experienced by the Company in its operations, rather than the opinion of respondent's engineer. It is far more reliable for surely the past experience of respondent is a much better guide than the opinion of an expert.

Judge Hand in the case of the *Consolidated Gas Co. v. Newton* took an average over a period of 13 years.

There should therefore be a credit to cost of **261**
ration for this item of \$5,749.73.

*D) The item of uncollectible bills should be
cluded as an operating expense of respondent.*
The amount of uncollectible bills allowed be-
y amounts to \$1,349.02 or .0040 cents per M
cubic feet sold (Ex. 64, p. 1572). This is the
hibit used by the Master and Court. **262**

The appellants contend that this item should
be excluded in a confiscatory case of this kind.

The Transportation Corporations Law of New
York (Section 63) authorizes respondent to
require:

" * * * every person to whom such cor-
poration shall supply gas * * * for light-
ing any building, room or premises, to de-
posit with such corporation a reasonable
sum of money according to the number and
size of lights used or required or proposed
to be used, for two calendar months by such
person and the quantity of gas * * * nec-
essary to supply the same as security for **263**
the payment of the gas * * * or compen-
sation for gas consumed * * * to become
due to the corporation, * * *"

The respondent, unless the deposit is made
as required by the above section, might cut off the
supply of gas to the consumer, or refuse to serve
him. **264**

Section 65 of the Transportation Cor-
porations Law.

The courts have even gone so far as to hold that
a gas company may cut off the supply of gas to

a consumer who neglects to pay, although he may have made a deposit as security.

*Hensig v. Queens Borough Gas Co.,
et al. Elec. Co.*, 47 Misc. (N.Y.) 375.

Here the company is authorized by statute to obtain in advance a deposit to cover gas to be thereafter sold to the consumer. In other words, it may have its money in advance. It is a protection not ordinarily afforded other business. At least with this safeguard the burden was upon respondent to show that it used more than ordinary diligence in its effort to collect its gas bills, and this ought to appear before any allowance is made for such item.

All that we have here is the inclusion of a sum for uncollectible bills without any competent proof showing diligence on the part of the respondent to collect the amount from its consumers. There is a lack of proof sufficient to warrant the court in allowing any sum for this item. While, on the contrary, we think, in view of the statute quoted, and the safeguards surrounding respondent in the sale of its gas, there ought not to be any allowance in any case for uncollectible gas bills.

Respondent has something better than a cash business. It may obtain its cash in advance and place it on deposit to await the day when it furnishes gas. It may then reimburse itself out of the consumers' money. There ought not to be any loss to the company by failure of a consumer to pay.

We submit that this item should be disallowed entirely and the exception sustained.

(E) *Interest excluded as
This amount
sold.*

The Trust
York (see)
may collect
the gas, a s
of gas.

This law
of the gas
valuable ris
money obtai
is deposited
and is used

The law
interest on
shall be pa
included in
\$1,621.10.

While we
itself with
to the credit
we find that
credit in ac
deposited
pays the
people's m
eral when
posited wi
a proper
inated.

The que
item in a

interest on consumers' deposits should be as an operating expense of respondent, amounts to \$1,621.10 or .0048 cents per M

transportation Corporations Law of New
Section 63) provides that gas companies
lief from the consumers prior to use of
a sum equal to two months' consumption

272

law, undoubtedly enacted at the request
gas companies, including respondent, is a
right bestowed upon the company. This
obtained in advance from the consumers
ited in the general funds of the company 273
sed for all its corporate purposes.

aw above referred to, also provides that
on this money belonging to the consumers
paid by the company. And so we find
1 in the operating expenses, the sum of
0 (Complts. Ex. 64, p. 1572).

we find that the company has charged 274
ith these amounts, as interest to be paid
consumers on this fund, still nowhere do
that the company has given the consumer
n any manner for the use of these monies
ed with it pursuant to law. The company
ne bank at least 6% for the use of other
s money, and surely it ought to be as lib-
en using the money of its consumers de-
with it. We submit that this item is not
er operating expense and should be elim-

275

question of the propriety of including this
in a rate litigation was before Judge Hand

- 276** in the case of the *Consolidated Gas Company of New York v. Newton, et al., supra*, and he said as follows:

"*Interest on Consumers' Deposits.* In whatever way figured, it seems clear that this is in no sense a proper item in the cost of distributing gas to the consumer. I am not trying to learn what were the revenues of the company in the past, but to establish a basis for the cost of distribution in the period to be covered by a decree. I disallow this item, forty thousand nine hundred and five dollars for 1918, and thirty three thousand and six hundred and one dollars for 1919."

- 277** We do not find this question was passed on by the Special Master, A. S. Gilbert, nor by Judge Mayor in his review of the Master's report.

The learned Judge however, has excluded this item in the cases of *Central Union Gas Company v. Newton* and *Northern Union Gas Company*,

- 279** which subsequently came before him for review. It should be excluded here.

(F) *The respondent used an excessive amount of boiler fuel in 1919 which should be deducted from operating expenses. The value of the excess is \$5,072.21, or 1.1 cents per M. m.c.*

- Appellants make the same contention in regard to boiler fuel as is made in regard to repairs, that is to say: The quantity used should not be based upon the abnormal amount claimed to be consumed in this year, but should be the amount shown to have been used by the company by taking an average for a period of years. We have averaged it over the years 1913 to 1918, inclusive.

The Master took as the basis for his figures 22 **281** pounds of boiler fuel per M cubic feet of gas made (see p. 38, wherein he sets forth cost of production 63.45 per M); this checks with complainant's Exhibit 64 where the cost is the same amount. He said in his report (p. 37), that approximately 19 lbs. of boiler fuel is necessary. He apparently failed to adopt this figure in his **282** cost of production because he accepted the figures in complainant's Ex. 64, p. 2496, and this exhibit is based on the amount of boiler fuel shown by complainant's books for year 1919. The testimony is illuminating.

"The Master: I see by the exhibit that in the year ending 1919, December 31st, they use 16 lbs of coal and seven tenths of a gallon of tar. That would make it over 25 lbs. **283**

"The Witness: Yes.

"The Master: That is pretty high, isn't it?

"The Witness: That is what they use." (p. 431.) **284**

This testimony throws some doubt on the question whether exhibit 64 does not have the equivalent of 25 lbs. of boiler fuel used. We, however, have assumed for the figures below, that only 22 lbs. were used. If 25 lbs. were used, then the saving would be even greater than we contend.

In the case of *Consolidated Gas Co. v. Newton, et al.*, Enginer Wood testified for that company that 14 lbs. per M were sufficient. Here, while testifying for respondent, he stated that 22 lbs. were necessary (p. 429). He was confronted with his testimony in the Consolidated Gas Company

*Net Earnings in Year 1919 as Claimed by
Appellants*

	Cents per M cubic feet gas sold	Amount	291
Repairs at works.....	5.88	\$19,770.01	
Transmission and distribution repairs	1.47	4,962.54	292
Unaccounted for gas.....	1.71	5,749.73	
Uncollectible bills	0.40	1,349.02	
Interest on consumers' deposits	0.48	1,621.40	
Saving in boiler fuel.....	1.41	5,367.20	
Total	11.35	\$38,819.60	
Court's findings (pp. 112, 114)	1,0129		293
Adjusted cost per M.....	.8994		
Revenue from sale of gas (p. 112)	1.0000		294
Miscellaneous revenue (Ex. 64, p. 2496) .....	.0675		
Total revenue	1.0675		
Adjusted net income .....	.1681	\$56,522.18	
Rate of return on appellant's rate-base in 1919 of \$895,545	6.3%		295

296

POINT V

THE COURT BELOW ERRED IN FAILING TO FOLLOW THE RULES LAID DOWN BY THIS COURT THAT IN DETERMINING THE FAIR VALUE OF RESPONDENT'S PROPERTY, DEPRECIATION SHOULD BE DEDUCTED.

297

The Court below has accepted the book figures of respondent showing actual cost as the fair value of respondent's property. The Court below makes no deduction for the decrease in the worth of the property due to such well known causes as wear and tear, obsolescence and inadequacy.

298

This is in direct conflict with common experience as well as the decisions of this Court for the depreciation of property is a fact, and its decline in value starts, as this Court has said, from the very moment it is put into use and continues until it is finally withdrawn from service.

299

Such depreciation is due to causes which have nothing to do with the cost of the property or book entries, or where the money comes from. Depreciation is a physical fact brought about largely by physical conditions, but also by changes in the art, changes in operating conditions and by the growth of cities. Whether

300

the item cost \$50,000 when new, or would cost now \$100,000, or whether the money was provided out of earnings or invested by the bond-holders is wholly immaterial; the property depreciates regardless of these factors. They may influence the amount of depreciation, it is

true, but they do not have anything to do with the question of whether depreciation should be deducted in determining fair value.

The appellants contend that a deduction should be made in determining fair value, not because the property has been in existence for some years, but because its value has decreased, due to causes that are real, and that the amount of decrease is generally measured by the relation of the period for which each item or class of similar items have been in use to the total useful life of the property. In other words, as Mr. Maltbie said when on the witness stand, age is a measure of depreciation and not necessarily a cause. Upon the other hand, respondents contend, and apparently the Court so finds, that no matter how long a thing remains in use, its value is its cost up to the very moment that it passes out of use. In other words, in one moment, the instant when property is finally withdrawn from service, its value passes from 100 per cent. to zero.

The falsity of the Court's conclusion, that a company is entitled to a return upon its "investment" without deducting anything for depreciation, even the needed repairs and renewals, may be shown in another way. Assume that the stock and bondholders of a company did invest \$10,000,000 in cash in physical property, does it follow that the security holders are entitled to a return upon \$10,000,000 as long as the company operates, without regard to the condition of the property, the probable remaining useful life of this property or the amount required for the re-

306 pairs and renewals which would be necessary to place it in what the company contends would be 100 per cent. operating condition.

The rule of law is clearly established that a company is not entitled to a return upon the actual cost of the property or upon the reproduction cost or upon any other measure of the cost

307 of property when new.

The rule in the Federal courts and in the courts of this State is the same — namely, that consideration must be given to the condition of the property and that deduction must be made from cost for the accrued depreciation.

The principal recent case upon this point in **308** New York State is *People ex rel. Kings County Lighting Co. v. Willcox, et al.*, 156 App. Div. 603, modified in 210 New York, 479. This case is not only important from the standpoint of the rule laid down that accrued depreciation must be deducted, but because of the strenuousness with which it was contended that there should be no

309 deduction for any depreciation and because of the fact that the decision, which the Kings County Lighting Company undertook to overturn, held positively that the straight line method should be followed in determining accrued depreciation, and that depreciation due to every cause, including inadequacy and obsolescence, as well as wear

310 and tear and other causes, should be deducted. This is the very method used by Mr. Hine in this case.

In that case, the Appellate Division upheld the Commission ruling that accrued depreciation

should be deducted from cost new in determining 311
fair value. The Court said (pp. 610-612):

"The Commission said 'cost of reproduction new is not necessarily an indication of present value. Depreciation and deferred maintenance are important factors. It held that the proper method to ascertain the value of the tangible property was to take the amount obtained by subtracting from the cost of reproduction its accrued depreciation, and therefore from its estimate of reproduction cost new, subtracted \$15,198 for depreciation.'

"The relator contends that this method is fundamentally incorrect; that said sum should not be deducted, but that the true rule is that the company is entitled to earn a return on the full 100 percent service value of its investment; that the fair value for rate-making purposes is equal to the total cost of reproduction less scrap value, without any deduction whatever for accrued depreciation; that, therefore, the Commission's total valuation is in error to the extent of the difference between said amount and Mr. Connette's total of scrap value \$183,150, or making in round numbers an amount of \$230,000, which would be added to the total valuation."

The Court did not agree with this proposition, but pointed out that there must be a deduction for accrued depreciation and that such an allowance had been made in various cases of this kind. The Court approved the amount of accrued depreciation deducted by the Commission on the

316 straight line basis and said that this was proper.

To the same effect is the *Knoxville Water Co. v. Knoxville*, 212 U. S. 1. In that case Justice Moody delivered the opinion of the Court. He said (p. 10):

317 " The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree . . . the mains, the service pipes, structures upon real estate, stand pipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case."

318 319 In the case of *Spring Valley Water Works v. City & County of San Francisco*, 192 Fed. Rep. 137, pp. 184, 186, Judge Farrington said:

320 " Depreciation may be delayed, but it cannot be prevented. Ultimately every structure in complainant's plant will be worn out by use, wasted by action of the elements, broken by accident, abandoned in the development of the system, or displaced by newer and more efficient contrivances. In view of this fact, it was held in the 1908 case that complainant was entitled to an annual allowance to cover such loss. The highest

courts have repeatedly declared this fact ³²¹
cannot be ignored in determining the value
of property in rate cases.

In *Knoxville Water Co. v. City of Knoxville*, 212 U. S. 1, * * * and more recently
in *Contra Costa Water Co. v. City of Oakland* (Cal.), 113 Pac. 668, the lower court
found the present cost of reproducing the
plant, but failed to take into account the fact ³²²
that an old plant is worth less than a new
one. In each, the result was a reversal.

It is impossible to measure accurately such
loss until it has matured. When a machine
is worn out, we know its original value is
gone; but while the machine is in use the
amount of deterioration is largely a matter
of opinion. Here the difficulties of the prob-
lem are increased by the fact that a very
large portion of the most valuable construc-
tion, such as pipes, masonry and concrete
work, are concealed in the ground or under
water. * * *

I find the annual depreciation of this plant
to be 1 per cent. per annum for cast-iron
pipe, 2 per cent. for wrought-iron pipe, 2.5
per cent. for pump engines, flumes and
wooden structures, and 5 per cent. for boil-
ers. Thus I have ascertained the annual de-
preciation to be \$212.982.

The total depreciation to be deducted
from the reproduction cost of structure is
\$2,922.538. This I have ascertained by mul-
tiplying the annual depreciation of each
structure for the number of years it has been ³²⁴
in use, using original cost as the basis of
calculation."

Mr. Maltbie and Mr. Hine testified as to ac-
crued depreciation or the amount that should be

326 deducted in determining the fair value of the property due to the decrease of the useful life of such property. Mr. Maltbie testified as to the general principles according to which depreciation should be computed (pp. 1227, 1232). Mr. Hine gave detailed testimony explaining fully the methods which he used (pp. 1180-1182). Both 327 defined depreciation as the term is generally used and as used, by them, to be decrease in worth or value due to all causes, such as wear and tear, decay, inadequacy and obsolescence.

The method which Mr. Hine used to measure depreciation as thus defined was as follows: In the first place, the age of each item of property was determined, or, if the age could not be determined, the probable remaining life was estimated. Next, an estimate was made of the probable useful life in service of each class of property, and the annual allowance for depreciation was then computed on the straight line basis. Thus, if an item of property had an estimated life of ten years and was five years old, the annual depreciation would be taken as one-tenth of the normal reproduction cost and the accrued depreciation would be five times the annual depreciation, or fifty per centum of the normal reproduction cost, assuming there is no salvage value.

329 Respondent contends that Mr. Hine's method is theoretical and does not take into account actual conditions, and the Master seemed to labor under somewhat the same delusion. As a matter of fact, Mr. Hine's estimates of accrued depreciation were based upon actual conditions and in order to determine the probable useful life of

each item of property he had studied the experience of the respondent, of all other gas companies within the city of New York and of many gas companies elsewhere. He testified that the property was maintained in fairly good operating condition and that his estimates are based upon the assumption that the practice will be continued.

We again call attention to the decision of the Appellate Division in *The People ex rel. Kings County Lighting Co. v. Willcox, et al.*, case (quoted above), particularly to the brief submitted by counsel in that case, and to the record itself.

Mr. Maltbie, as a member of the Public Service Commission for the First District, wrote the opinion of the Commission in that case from which an appeal was taken to the Appellate Division. The method followed for determining accrued depreciation by the experts of the Public Service Commission when the case was before that body, and the method used by the Public Service Commission in its decision, were the same as that followed by Mr. Hine in this case—namely, the straight line method based upon the relation of age to probable total life.

The decision of the Commission was attacked by counsel for the *Kings County Lighting Company* before the Appellate Division as to the reasonableness of the method and the correctness of the findings of fact. Counsel for other utility companies submitted a long brief upon this subject, contending that no deduction should be made for depreciation beyond deferred mainte-

331

332

333

334

335

336 nance. The decision of the Appellate Division was clearcut and conclusive. The court repudiated the theories of counsel for the utility companies and sustained the decision of the Commission both upon points of law and of fact. It is significant that although an appeal was taken from the decision of the Appellate **337** Division to the Court of Appeals upon certain of the conclusions of law reached by the Appellate Division, there was no appeal from the rulings as to depreciation and they stand as the law of the State of New York.

As Mr. Maltbie pointed out in his testimony, the value of a thing depends upon the amount of **338** useful service which it will render. This decreases as time passes, and consequently its value must likewise decrease and is at 100 per cent only at the moment it is put into use.

Mr. Justice Moody, in the case of *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 10, calls attention to this fact in the following language:

339 "The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages with different expectations of life.

But it is clear that some substantial allowance for depreciation ought to have been made in this case. The officers of the company, *alio intituta*, estimated what they called 'incomplete depreciation' of this plant (which we understand to be the depreciation of the surviving parts of it still in use) at \$77,000, which is 14 per cent of the master's appraisement of the tangible property. A witness called by the city placed the reproduction value of the tangible property at \$332,000, and estimated the allowance that should be made for depreciation at \$118,000, or 32 per cent. In the view we take of the case it is not necessary that we should undertake the difficult task of determining exactly how much the Master's valuation of the tangible property ought to have been diminished by the depreciation which that property had undergone. It is enough to say that there should have been a considerable diminution, sufficient at least to raise the net income found by the court above 6 per cent upon the whole valuation thus diminished."

344

The court in the decision of *Brooklyn Heights R. R. Co. v. State Board of Tax Commissioners*, 69 Misc. 646 (page 656 says):

"As surely as humanity travels to the grave, the machinery and equipment of a public service corporation travels toward the scrap pile. The plant and structures depreciate in less degree but as certainly. This is ordinary depreciation.

But another form of depreciation in the case of properties here being valued takes place. The machinery or equipment, while still capable of years of service, becomes in-

345

- 346** adequate to do the work demanded—not only by the corporation, but by the law itself. In the case particularly of electrical machinery, the type becomes obsolete by reason of invention, and increasing public demands frequently require in aid of safe and adequate service that the obsolete appliance or equipment give way to the new. Property which in itself may be almost indestructible in the hands of a public service corporation may be required to be replaced by the requirements of the public which the corporation serves. These requirements for change of plant, structure and equipment and their replacement, can be and are made by the State itself. Some of these changes are capable of definite ascertainment. Others are not so readily ascertainable. Many of them, however, may be provided against for the future by setting apart from gross earnings a reasonable sum to create a reserve against the day when they shall come.¹⁷
- 347**
- 348**

In the recent decision by ex-Judge Hughes as before in the *Brockline Borough Gas Company v. Public Service Commission*, 47 N. Y. State Department Reports, 81, the expert for the company testified as to observed depreciation and allowed a small amount comparable with the amount estimated by Mr. Miller in the present case. Mr. Justice Hughes was asked to limit the amount of depreciation deducted to observed depreciation. This he refused to do, saying:

"As was said by the Court of Appeals in the case last cited (Kings County Lighting Company) : 'The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But

it is merely a rule of convenience and must be applied with reason.³⁵¹ The only evidence apart from the plaintiff's books is the testimony of Mr. Shattuck, the plaintiff's expert³⁵² but this relates only to the depreciation he observed. He conceded that there was depreciation or deterioration of the property not covered by ordinary repairs and that he had not given consideration to it in his appraisal. In the absence of any countervailing evidence, the depreciation on the plant may fairly be taken at the amount shown in the books, and if the attacked rate permitted an adequate return after making such allowance, there would be no ground for asserting confiscation; and whether the rate is confiscatory is the question here.³⁵³

The attention of the Court is also called to the fact that the accrued depreciation allowed in that case was based originally upon the findings made by the Public Service Commission, Commissioner Mattheie writing the opinion, which in turn were based upon an appraisal made by Mr. Hine in a rate case. The record before the Public Service Commission shows that accrued depreciation was estimated by Mr. Hine by the same method followed by him here. Ex-Judge Hughes' opinion, when read in the light of these facts, is a decision strongly supporting the claim made by appellants and repudiating the claim made by respondent.

The court below failed to deduct anything for depreciation and in this, we claim he committed reversible error.

Assuming that our interpretation of the law is correct, and that depreciation due to all causes should be deducted in determining the fair value

354

355

356 of property, we call attention to the fact that there is no testimony except that of Mr. Hine as to the reasonableness of the amount of such depreciation, and appellants contend that the figures given should be taken as the proper amount of depreciation to be deducted. The figures given represent the value of the property after accrued depreciation has been deducted, and appellants contend that the decree should be set aside and that the evidence given by witnesses for appellants should be taken as determining the fair value of the property.

POINT VI.

WORKING AND CONSTRUCTION CAPITAL, ORGANIZATION, AND UNDISTRIBUTABLE STRUCTURAL ITEMS, GENERALLY CALLED "OVERHEADS" ARE LESS THAN \$100,000.

Working and Construction Capital

359 The company has a right to have included in the value of the property which it gives to the public service a certain sum which shall be adequate for its working and construction capital.

This represents money advanced by the utility, other than fixed capital defined in the Uniform System of Accounts as property with a probable service life of more than one year, for which it is reimbursed when revenue is collected.

360 In his opinion, the Master states:

"Taking into consideration the various elements which are and must be provided for in arriving at the necessary amount of working capital, I have reached the conclusion that \$135,000 would be a fair sum to be allowed for working capital" (p. 56).

The Court below, in reviewing the Master's **361** report, did not pass upon the reasonableness of this allowance, but determined the value of the property in a lump sum, saying:

"All other findings touching the rate base have become immaterial to this case" (p. 115).

362

And again:

"All exceptions filed by the defendants and not herein before referred to are not passed upon because immaterial to this decision" (p. 118).

The Master's report therefore, respecting this item, was not affirmed by the Court below. **363**

Witness Maltbie testified the sum of \$70,000 was ample (pp. 1214-1219).

He was subjected to severe cross-examination (pp. 1261-1285), but his result was unshaken. His experience, knowledge and fair dealing with public utilities covering a long period of time should be accepted in preference to witness Miller who testified on this item for the respondent. **364**

It must be kept in mind that his item of \$70,000 includes construction capital as well as working capital. The phrase is intended to mean the amount of money or its equivalent in property **365** which the company must provide in advance of the time when it will be reimbursed by the consumers of the gas company either in the way of payments for gas or in payments for the rental of appliances.

- 366** The respondent's witness Miller estimates \$165,000 as the requirement for working capital, made up as follows:

Materials and supplies.....	\$60,000
Cash in office and banks.....	50,000
Accounts receivable	35,000
Gas furnished to consumers, but not yet billed	20,000

367

(p. 567.)

- Respondent's witness Miller must have felt uncertain about these figures for after stating the same he qualifies them by this statement (p. 567):

"*This amount is more of working capital than the company has had but it is no more than the company needs and should have in view of the present prices of materials, supplies, labor etc. The fact that in other years the company has struggled along under the present statutory rate with an amount less from time to time than without the amount now shown should not control the amount proper to be allowed in view of the present level of prices.*"

- 370** There is no evidence whatever either in the record or in the books of the company that the amount set forth for materials and supplies, cash, accounts receivable and gas furnished, averaged or equaled Mr. Miller's figures. An examination of defendants' Exhibit A-8, from 1906 to 1919, inclusive, indicates that at no time have any of these items equaled or nearly

equaled the amount now demanded by the respondent company as proper sums to make up the working capital allowance.

Respondent's witness Miller endeavors to sustain his amount for working capital in the sum of \$165,000 to the effect that the company require or should have fifty cents a thousand cubic feet for working capital.

The Master very well stated how preposterous and ridiculous was such a requirement (p. 917):

"The Master: Well, I never ran a gas company but it does seem high to me that a concern doing a business of \$330,000 to \$340,000 a year should have \$150,000 working capital."

The Master has neither in his findings or opinion given any indication as to how he arrives at the amount of \$135,000. There is no evidence to sustain an amount beyond that testified to by appellant's witness Maltbie.

A consideration of the foregoing figures and the evidence confirm the fact that the \$70,000 as testified to by witness Maltbie is correct and fair.

Organization—Legal, General and Preliminary Expenses

We contend that for organization, legal, general and preliminary expenses prior to August 1, 375 1904, and on the basis of what the books themselves show for expenses incurred since that time, there should be allowed a maximum amount of \$10,000.

376 In respondent's witness Miller's exhibit (No. 66, p. 564), there is set out \$135,000 "for organization and development expenses prior to construction."

This item includes numerous other expenditures and there is no separation whatever as to any value for "franchises," or of the cost of

377 the same.

We refer to his testimony (pp. 847-849):

"Q. Your item for organization and development expense prior to construction is an estimate on your part? A. Yes, an estimate based on my experience.

"Q. How did you make up that sum of \$135,000?

378

"Mr. Ransom: Objected to on the ground that the notes fully show.

"Mr. Chambers: The notes do not do anything of the kind.

"Mr. Ransom: It states the basis, and the detail of the things that go into it.

379

"Mr. Chambers: I want to know what the details are. I think we are entitled to have it. If the Master rules it out, all right.

"The Master: Are the details set forth on that exhibit, Mr. Miller?

"The Witness: In general description. There is a general description of that here.

380

"Q. There is nothing but the lump sum of \$135,000, is there?

"The Master: Let us see it. I sustain the objection to the question as put. You can ask him any more details that you want.

"Q. You have put something in for services of sponsors. What do you mean by that? A. I mean the people who stand behind the

enterprise. You may call them the promoters or such persons as get up the enterprise.

"Q. How much did you allow for those fellows? A. I have not subdivided it. I have had items of this kind run all the way from five to fifteen per cent of the whole enterprise. In this case the amount is something less than five per cent. I have not attempted 382 to subdivide it.

"Q. You allow something for local consents - how much for that? A. I have not subdivided it at all.

"Q. How much did you allow for franchises? A. The same answer.

"Q. Supposing they did not pay anything for their franchises, you would allow something anyway?

"The Master: Who is 'they'?

"Mr. Chambers: Any of the companies.

"Q. If nothing was paid for these franchises you would still have allowed something, would you? A. *Nothing has been allowed to any amount in this case.* If I had put in anything actually for franchises I should have put in a considerably higher amount. The franchise had a greater value.

"Q. You say the \$135,000 includes franchises? A. I do not say any actual payment.

"Q. You don't know anything about whether they made any or not? A. I do not. I think in all human probability they paid 385 more than this amount in the case of this company.

"Q. What is this amount? A. \$135,000.

"Q. For franchises? A. No, for everything, for the amount which I have allowed and which I say I have not subdivided.

386 "Q. Does it include anything for franchises or not? A. If anything was paid it is intended to include it.

"Q. Mr. Miller, you made this up? A. I made it up.

387 "Q. And you said amount the items was franchise? Did you allow, or did you not allow, anything for franchises? A. I have stated that I have allowed about five per cent *to cover the preliminary expense*, and which in my opinion carries anything that was probably actually paid to the local authorities. I don't know whether they paid anything or not.

388 "Q. Did you make any investigation to determine what they paid the local authorities?

"Mr. Ransom: I object to this line of inquiry.

"The Master: Objection overruled.

"Mr. Ransom: Exception.

389 "Q. Did you? A. Not to the local authorities. The books show a very large payment for franchises.

"To whom? A. To the predecessor company.

"And you treated that as a payment for franchises? A. I did not. That was an amount of something like a million dollars, and we are discussing a figure of \$135,000.

390 "Mr. Ransom: Counsel is failing to distinguish between the expenses incurred in the obtaining of a franchise, and payment for a franchise.

"By the Master:

"Q. You say the books show a payment of a million dollars for franchises? A. The

books opened with a million dollar item for 391 franchise.

"Q. Do the books show a payment for franchises? A. They do not show any cash payment, but they open with an item of a million dollars and something for franchises, and against that stocks and bonds were issued.

"Q. There were only \$600,000 of stock 392 and \$400,000 of bonds altogether? A. The opening entry shows a very large item on franchises and property.

"The Master: Is that opening entry here?

"Mr. Ransom: No, the original book is not here.

"Q. Is it your testimony that anything 393 you found on the books justifies you in the statement that they paid a million dollars for franchises? A. No, I don't believe they paid that. I know there was a great deal of real property in that account, from my own investigation.

"By Mr. Chambers:

"Q. That was an opening balance, was it, 394 that is all? A. That is all.

"Q. Or a balancing entry? A. Well, it was an opening entry.

"Q. Wasn't it a balancing entry? A. It probably was. They probably lumped the whole plant in it."

As was testified by defendants' witness Maltbie (p. 1212), and undisputed in the record, there has been no items charged since 190² to the fixed capital account for "organization, legal and general expenses" and as further testified to by the witness Maltbie if the legal expenses were incurred they were charged as an operating expense and the operating expenses so show. 395

Franchises

396 The company is not entitled to any return on "franchises." The weight of authority is to the effect that the "franchise" value should be excluded from the property upon which the company is entitled to a return.

397 *Spratt's Valley Water Works Co. v. City of San Francisco*, 192 Fed. Rep. 137.
Cumberland T. & T. Co. v. City of Louisville, 185 Fed. Rep. 637.
Home Tel. Co. v. City of Carthage, 179 So. West. 547.

398 Treating the question generally as to whether the value of "franchises" should be included or excluded from the property upon which the company is entitled to a return, we have but to recall the opinion of Judge Hough in the Consolidated Gas Company case, wherein he says in answer to the company's contention that the franchise value should be included:

"As a general proposition I believe this claim unsound." *Consolidated Gas Co. v. City of N. Y.*, 157 Fed. Rep. 849, at p. 873.)

Respondent rests its contention as to the inclusion of the franchises upon the opinion of the Supreme Court in the first Consolidated Gas Company case, but as concerns such a proposal we respectfully ask that the entire opinion be read and special attention given to the following language in said opinion:

"What has been said herein regarding the

value of the franchises in this case has been **401**
 necessarily founded upon its own peculiar
 facts and the decision therein can form no
 precedent in regard to the valuation of fran-
 chises generally, where the facts are not
 similar to those in the case before us. We
 simply accept the sum named as the value
 under the circumstances stated." (*Willcox*
v. Consolidated Gas Co., 212 U. S. p. 48.) **402**

The case of *Lincoln Gas and Electric Co. v. The City of Lincoln*, 182 Fed. Rep. 926, follows
 the general rule, excluding franchise value.

District Judge W. H. Münger, in explaining
 the exclusion of franchise value, says (p. 928):

"I do not allow anything as the value of **403**
 complainant's franchise; it does not appear
 from the allegations of the bill or proofs
 that anything was paid to the city for the
 franchise; the city simply granted to com-
 plainant, without compensation, the right to
 use the public streets and the alleys for the
 purpose of constructing and operating its
 plant. This was a mere right and privilege **404**
 to complainant and did not involve the ex-
 penditure of money; while it is true a fran-
 chise is a property right, which will protect
 complainant in its use of the streets and al-
 leys for the purposes expressed, yet it in-
 volves no investment of money, complain-
 ant's investment being in its tangible prop-
 erty under authority of the franchise, and **405**
 the public ought not to be taxed for a privi-
 lege which it has voluntarily granted. I do
 not think that there is anything in the case
 of *Willcox v. Consolidated Gas Company*,
 212 U. S. 19, which conflicts with this view."
 Likewise there is the *absolute prohibition*
 against the capitalization of franchises as found

406 in Section 69 of the Public Service Commissions Law of New York:

"§ 69. *Approval of issues, stock, bonds and other forms of indebtedness.* * * * Provided, however, that the Commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right. * * *"

407

408 In the recent case of *Bronx Gas and Electric Company v. Public Service Commission*, 190 App. Div. 3d, at page 25, Mr. Justice Page says:

"We observe also that the plaintiff seeks to have its franchise included in its property upon the value of which an adequate return is to be estimated. It has been repeatedly held, and is now settled, that the franchise which is obtained from the State is not property devoted to the public use, upon the value of which it is entitled to a return from the rate charged for its service."

410 There is no proof whatsoever in the record as to the cost or value of the franchises or of any sums paid or required to be paid to the local authority where the respondent operates. This is very clearly shown (pp. 846-849, 848) when respondent's witness Miller was on the stand under cross-examination pertaining to complainant's Exhibit No. 66.

"The Master.—What proof is there in **411** the record as to franchises?

"Mr. Ransom.—The books.

"The Master.—Only that.

"Mr. Ransom.—So far, and the franchise documents.

"Mr. Neumann.—What do the franchise **412** documents show, the price?

"Mr. Ransom.—They speak for themselves."

And again (p. 1230):

"The Master.—Was there proof offered of the cost to reproduce the franchises? **413**

"Mr. Ransom.—Well, of course, the Miller exhibit in that respect related to the tangible property and the so-called non-distributed structural cost in connection with the tangible property.

"Mr. Neumann.—I understood Mr. Miller especially excluded franchises from reproduction cost. **414**

"The Master.—What I am trying to get at is, what basis have I for valuing franchises?

"Mr. Neumann.—None at all.

"The Master.—I am asking Judge Ransom something, Mr. Neumann. **415**

"Mr. Ransom.—I take it that from all of the evidence in this case, the testimony of Col. Miller which related to that point, the evidence shown by the books; the evidence as to the acquisition of the property in 1904 and what was paid therefor, the judgment of the

416 Board of Directors as to the value to be put upon those so-called intangibles—it is not a simple question, it is not a matter which has been adjudicated it was the situation as to the value of the franchises and rights in the Consolidated case.

"The Master.—That is what bothers me.

417 "Mr. Ransom.—I am fully aware that it is a difficult question."

Interest and Taxes During Construction

The amount for interest and taxes during construction cannot exceed \$6,700. As testified to by appellants' witness Maltbie there were no charges for interest and taxes during construction as shown by the books of the company from 1904 to near the end of 1915. Near the end of 1915 there is an item as shown by defendants' exhibit A-92 of \$402.97. It was an estimate based upon the amount of fixed capital in 1904, there should be allowed the sum of \$5,000, to which should be added the item found in the books near the end of 1915, and an item found in the books in 1919, which is a charge of \$1,152.32, all as shown in complainant's exhibit A-93, for interest on money borrowed from Consolidated Gas Company, which amounts in round figures to a total sum as of December 31, 1919, of \$6,700 (p. 1219).

Omissions and Contingencies

420 We contend that there should be no specific amount allowed for omissions and contingencies, and refer to the testimony of defendants' witness Maltbie (p. 1220):

"The Master.—* * * In arriving at a figure for reproducing property new in 1904,

or any other time, would you allow or should there be in your opinion included an item for omissions and contingencies?

* * * * *

"The Witness.—Whether there is anything to be allowed for an omission depends on the carefulness with which the inventory has been prepared.

422

"The Master.—Precisely."

And (p. 1221):

"By the Master:

"Q. * * * I will permit you to answer whether if you were making up a statement of this kind you would include omissions and contingencies."

And again (p. 1221):

"A. Not in cost, because the cost is shown by the books. You have everything in it.

"Q. No, but in estimating reproduction cost? A. In estimating reproduction cost it would depend upon the care with which the inventory had been made. *In some inventories I should make a deduction for duplications rather than an addition for omissions.*

"Q. And in some other instances, it might be proper to allow for omissions and contingencies? A. Well, in some other cases, your Honor, some allowance might properly be made for omissions. Now, contingency item is usually covered in the unit prices which are allowed and not as a separate item, and it would depend upon the character of the work.

"The Master: Well, we have had enough of that. Take the next one."

426

POINT VII.

THE FAIR VALUE OF RESPONDENTS' PROPERTY DEVOTED TO THE MAKING AND DISTRIBUTING GAS AND UPON WHICH IT IS ENTITLED TO A FAIR RETURN, DOES NOT EXCEED THE FOLLOWING AMOUNTS FOR THE RESPECTIVE YEARS.

427	December 31, 1906,.....	\$402,711
	December 31, 1907,.....	434,253
	December 31, 1908,.....	467,593
	December 31, 1909,.....	503,470
	December 31, 1910,.....	536,825
	December 31, 1911,.....	584,825
	December 31, 1912,.....	615,422
	December 31, 1913,.....	639,099
428	December 31, 1914,.....	672,132
	December 31, 1915,.....	751,772
	December 31, 1916,.....	831,867
	December 31, 1917,.....	867,871
	December 31, 1918,.....	871,874
	December 31, 1919,.....	898,545

429

As of January 1, 1920, and the present time the Master found (Finding 34, p. 41) that the fair value of the property on which the respondent company was entitled to have a fair return exclusive of working capital to be at least the sum of \$1,720,579.41, composed of the following

430 (p. 81)

1. "Tangible and intangible property acquired at the end of July, 1904, and still owned and used by it on January 1, 1920, exclusive of working capital" \$670,488.86

2—"Additional land, plant, apparatus, mains and other property, less withdrawals, since August 1st, 1904, and exclusive of working capital"	\$850,389 08
Total	\$1,520,877 94

When the case came on before the District Court, appellants successfully convinced the court that this finding of the Master was erroneous. Since respondents have filed no assignment of error nor taken an appeal from the decree of the lower court, modifying the Master's finding, we shall not further discuss what the Master found **433** on the question of valuation.

The District Court said in modifying the Master's report:

"The actual cost of the tangible property aggregates \$1,430,497.08 (p. 115) * * * Thus, the sum of \$1,430,497.08 is the absolute minimum of actual investment and I hold also, on the evidence in the case, that it is the **434** minimum of reproduction value" (p. 115).

Appellants have shown that the Court below was in error in finding that there was not a sufficient return in the year 1919. Hence it is necessary to determine a rate base or valuation for the whole period. For convenience we have divided the above point into two subdivisions; (a) the fair value for the years 1906-1918; and **435** (b) the fair value for the year 1919.

(a) *Fair value of respondent's property used and useful and upon which it is entitled to a return for years 1906-1918 inclusive.*

Since the appellants contend that the whole

436 period should be adopted for the purposes of this case, it is necessary to determine a rate base or valuation for the same period so as to properly find the return enjoyed year by year.

REAL ESTATE.

The actual cost of the land as appearing on **437** respondent's books is shown by respondent's Exhibit 96 (pp. 1605-1606). This exhibit shows the cost of land, plant, etc., acquired by the respondent on August 1, 1904 (estimated as of that date), land, \$19,423.00.

The exhibit further shows the "cost of additions to real estate, 1904-1920" as follows:

438	Date of		
	Description	Acquisition	Cost
Plot "A"		1909	\$1,200 00
Plots "B" "C" and "D"		1911	5,901 25
Plots "E" and "F"		1912	1,128 00
Plots "G" and "H"		1915	12,388 39
Sundry		1917	13 26
439			<hr/> \$20,630 90

Thus the actual cost of the land as shown on the books of the company totals \$10,053.90 and includes attorney's fees, expenses for title examination (p. 1120) and all other expenses in connection with the acquisition of land.

440 The Court below, in adopting the actual cost from the books of respondent undoubtedly found the cost as its present value.

Appellants sought to introduce testimony from qualified witnesses, deputy tax commissioners, showing the fair market value of the land during the years 1904-1920 inclusive.

Appellants' witness, Mr. Walsh, was not allowed to testify as to the value of the land in early years, the Master saying **441**

"I do not think we need any more testimony of deputy tax commissioners as to values in this case (p. 1119).

This we contend was error on the part of the Master. **442**

The evidence of appellants' witnesses allowed by the Master shows the fair market value of the land is as follows:

1909.....	\$6,650.....	(p. 1082)	
1910.....	6,650.....	(p. 1082)	
1911.....	12,200.....	(p. 1083)	
1912.....	12,600.....	(p. 1083)	443
1913.....	12,600.....	(p. 1083)	
1914.....	12,600.....	(p. 1083)	
1915.....	12,600.....	(p. 1083)	
1916.....	13,300.....	(p. 1096)	
1917.....	13,600.....	(p. 1096)	
1918.....	13,600.....	(p. 1096)	
1919.....	13,600.....	(p. 1096)	444
1920.....	13,600.....	(p. 1096)	

Respondent introduced testimony respecting the value of its land by Mr. Thomas Halloren, who placed a valuation of \$55,000 on the various parcels (p. 301).

The Master said regarding the value of the land

"In my opinion it is worth less than Halloren says it is * * * (p. 1114). **445**

We point out these facts which conclusively show that in adopting the book figure of actual cost of land, the Court below has been very liberal to respondent, and unquestionably adopted an excessive valuation for the land of the respondent.

446 FIXED CAPITAL, OTHER THAN LAND.

The evidence as to the fixed capital, other than land, for the period 1906 to 1918 inclusive, of former Chief Gas Engineer of the Public Service Commission Willard F. Hine, witness for appellant, stands uncontradicted. The respondent offered no evidence of the value of its property prior to the year 1919, relying upon a valuation placed upon its property of that year alone.

447 Mr. Hine, after making a careful examination and study of the books, vouchers and other data of respondent, found the uncontradicted average valuation of the tangible property of respondent, 448 excluding land, for the years 1906-1918 as follows:

	Year	
	1906.....	\$346,288
	1907.....	377,830
	1908.....	408,170
	1909.....	437,847
449	1910.....	466,202
	1911.....	507,582
	1912.....	542,770
	1913.....	561,447
	1914.....	589,480
	1915.....	656,732
	1916.....	731,327
450	1917.....	762,318
	1918—including Douglas extension	761,321

(Exhibit A109 corrected upon the trial by deducting \$33,444 typographical error—p. 1877.)

The foregoing figures are taken from Exhibit 451 A109, p. 1877, corrected upon the trial by deducting for each year the sum of \$33,444, occasioned by a typographical error made in addition when the tables were made up (pp. 1332, 1333).

For the convenience of the Court we set forth below appellants' rate base for the years 1906-1918, inclusive:

452

453

454

455

94

456

-457

458

459

460

	AVERAGE RATE BASE, 1906-1918				
	1906	1907	1908	1909	1910
Land, cost per comp't's Ex. No. 96 pp. 1006-1007	\$19,423.00	\$19,423.00	\$19,423.00	\$20,623.00	\$20,623.00
Other fixed capital, Ex. "A" 100 (corrected), p. 1877	346,288.00	377,830.00	408,170.00	437,847.00	466,202.00
Working capital, Ex. "A" 112 p. 1880	22,000.00	22,000.00	25,000.00	30,000.00	35,000.00
Organization interest and taxes Franchises	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Actual cost unknown. Books of original companies not produced.	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00
Total	\$402,711.00	\$431,323.00	\$467,593.00	\$513,470.00	\$536,825.00
Going value					
Land, cost per comp't's Ex. No. 96 (pp. 1006-1007)	\$27,652.25	\$27,652.25	\$40,040.64	\$40,040.64	\$40,053.90
Other fixed capital, Ex. "A" 100 (corrected), p. 1877	561,417.00	581,480.00	656,732.00	731,327.00	762,318.00
Working capital, Ex. "A" 112, p. 1880	35,000.00	40,000.00	40,000.00	45,000.00	50,000.00
Organization interest and taxes Franchises	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Interest and taxes Franchises	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00
Total	\$679,099.25	\$872,132.25	\$871,772.64	\$881,807.64	\$887,871.90
Going value					
Land, cost per comp't's Ex. No. 96 (pp. 1006-1007)	\$27,652.25	\$27,652.25	\$40,040.64	\$40,040.64	\$40,053.90
Other fixed capital, Ex. "A" 100 (corrected), p. 1877	561,417.00	581,480.00	656,732.00	731,327.00	762,318.00
Working capital, Ex. "A" 112, p. 1880	35,000.00	40,000.00	40,000.00	45,000.00	50,000.00
Organization interest and taxes Franchises	10,000.00	10,000.00	10,000.00	10,000.00	10,000.00
Interest and taxes Franchises	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00
Total	\$679,099.25	\$872,132.25	\$871,772.64	\$881,807.64	\$887,871.90

(b) *The fair value of respondent's property 461 used and useful and upon which it is entitled to a return for the year 1919, does not exceed the sum of \$598,515.90.*

The Court below states

"The actual cost of the tangible property aggregates \$1,130,497.08" (p. 115). ⁴⁶²

"Thus, the sum of \$1,130,497.08 is the absolute minimum of actual investment, and I hold also, on the evidence in the case, that it is the minimum of reproduction value" (p. 115).

It will be seen therefore that the Court below accepted the actual cost of respondent's property as shown by the books of the company, as the fair value of its property. ⁴⁶³

The Court made no allowance for decrease in worth due to depreciation, which we firmly believe is contrary to the decision of this Court.

Further, in adopting these book figures, the Court includes in its rate base, the total cost of the Douglaston extension, so called. This extension was made pursuant to an order of the Public Service Commission of the State of New York for the First District on March 19, 1915, and required the respondent to extend its mains and services to the settlement known as Douglaston, about six miles from the respondent's plant. ⁴⁶⁴

Respondent strenuously opposed this order and took the necessary steps to review it successively in the following courts: Appellate Division of the First Department (171 App. Div. 580); Court of Appeals (219 N. Y. 84), and in this Court (245 U. S. 345).

466 The building of this extension was finally begun in the year 1919 and put in operation in November, 1919.

Instead of costing, as originally estimated, about \$80,000 to build the extension, the respondent resisted the lawful order of the Commission, until the cost of construction arose to about \$115,000 in 1919 (Def't's Ex. A108, p. 1876), and \$117,

467 000 up to May, 1920.

This enormous cost of constructing this extension at war prices so long resisted, has been accepted by the Court below, in the actual cost as shown by the books of the company, and the present consumers are made to pay an adequate return upon this costly extension, without waiting

468 a reasonable time for the company to develop the increased business resulting from the extension.

An indication of the new business, resulting in a large degree from this extension, is seen in the fact that the increase in gas sales in 1920 amounted to at least 15 per cent in excess of the sales during 1919.

469 The injustice of allowing, as against the present consumers, the full value of this unusually large and costly extension, without awaiting ample time to develop the business caused by it, is apparent. It is unfair to thrust upon the present consumers, the burden of paying a fair rate upon a large extension, soon to earn in itself a favorable return and no doubt sufficient to forego a few lean months while the business is being annexed.

The appellants contend that the Court below erred in accepting the total book figure showing actual cost of this extension for the rate base in the year 1919. It would have been more equitable

to have spread such expense over a period of 471 five years, and include only that portion of the gross expenditure in each of the years following 1919.

Mr. Hine, the former chief gas engineer of the Public Service Commission, after an exhaustive study of the books and other records of respondents, determined that the company's fixed capital, other than land, cost on December 1, 1919, the sum of \$1,122,862 (Deft.'s Ex. M108 (corrected) p. 1876). This includes the cost of the Douglas extension made during the year.

The above figure is comparable with the figure found by the Court below of \$1,130,497.08.

Mr. Hine then determined the average fixed 473 capital of respondent as follows:

AVERAGE FIXED CAPITAL, EXCLUDING ENGINEERING, 1919 (EX-
CLOSIVE OF LAND)

	Cost	Cost, less Depreciation	Cost, less Depreciation
Inclusive of Douglas exten- sion at cost	\$973,536	\$211,054	\$762,492
Including Douglas exten- sion of one-half cost	1,097,261	211,054	796,210
Inclusive of Douglas exten- sion at cost	1,040,984	211,054	829,930

The above figures are taken from respondent's Ex. M10 (p. 1878), corrected upon the trial by deducting for each year the sum of \$33,444, occasioned by a typographical error made in addition when Mr. Hine's table was made up. 475

It will be noted that the point of difference in the figures found by Mr. Hine and the figures found by the Court below lies in the fact that Mr. Hine has determined the *average* fixed capital

476 for the year, and deducted the sum of \$211,054 for the accrued depreciation, while the Court below accepted the book figures as cost as of December 31, 1919, without any allowance for depreciation and applied that figure for the entire year of 1919. The method followed by the Court lacks the merit and the more equitable basis of Mr. Hine's determination.

477

The foregoing figure of average fixed capital including engineering, 1919, should have added to it, the land \$40,053.90, working and construction capital \$80,000, organization \$10,000, and taxes during construction \$6,000. The figures will be as shown in the following table:

478 Rate base for year 1919.

Land	\$40,053.90
Average fixed capital, etc.....	762,492.00
Working and construction capital...	\$0,000.00
Organization	10,000.00
Interest and taxes.....	6,000.00
<hr/>	
479 Total	\$898,545.90

and if the Douglaston extension is included at \$67,428, making a total of \$965,983.90.

POINT VIII.

480 THE MASTER ERRED REPEATEDLY IN THE ADMISSION AND EXCLUSION OF EVIDENCE WHICH ERRORS WERE NOT CORRECTED IN THE COURT BELOW.

It would be quite impossible for the appellants to point out all the errors committed by the Master in the admission and exclusion of evidence,

but we shall confine our remarks under this head- 481
ing to the most serious ones.

(1) *One of the important questions in the case was that of the delay in building of the so-called "Douglaston Extension," the additional cost occasioned by the delay and the exclusion from the rate base of the expenditure for such improvement.*

482

The Public Service Commission, one of the defendants in this action, offered an opinion of the Commission (Exhibit P, p. 1730), and the opinion of the Commission denying a second application of respondent for a rehearing (Exhibit U, p. 1748), in this matter which were excluded upon the Master's own motion. Yet at the same time 483
the Master allowed the petition and order in the second certiorari proceeding to be admitted in evidence (Complainant's Exhibits 110 and 111).

The exclusion of Exhibits P and U by the Master was arbitrary and upon his own motion (pp. 1780-1788).

484

"Mr. Neuman: I must object to striking it out at this time, after it has been received and now that he cannot get in what papers he wants, you cannot strike out our exhibit from the record.

"The Master: But I will, and allow you an exception. I will strike out Exhibit P. I think I was in error in allowing it in. 485

"Mr. Neuman: Exception.

"Mr. Cummings: Exception.

"The Master: I shall also reconsider my ruling as to Exhibit U.

"Mr. Neuman: I call to the Master's attention, that at this time there has been no

486 application of this kind made by the complainant, this is solely on the Master's own motion.

487 "The Master: Yes. Opinion denying the second application, in other words I am striking out opinions as distinguished from orders directing things to be done, and I strike out this Exhibit U. I think I probably went too far in allowing P and U in, which are opinions of the Commission.

"Mr. Cummings: You are just letting in another one.

"The Master: Yes, I am letting that in because it contains the statement of a fact.

488 "Mr. Neuman: Well, those contain statements of fact.

"The Master: No.

"Mr. Neuman: Why, those contain the statements of fact as to what this Company was doing there, making a hippodrome out of the courts.

489 "The Master: Very well, I may be in error about it, but that is going to be my ruling.

"Mr. Neuman: There is no doubt about it that you are in error" (pp. 1325-1326).

490 (2) *Appellants were not permitted to introduce the evidence of Deputy Tax Commissioner of the city of New York, concerning the value of real property for the years 1906-1909 unimproved.*

The appellants endeavored to show the value of the real property, land and buildings, as fixed by the tax officials of the city of New York.

The master himself interposed the objection to

the evidence without any request from the com- 491
plainant (p. 1119).

Also the testimony of Frederick A. Dede, a Deputy Tax Commissioner, was excluded (p. 1070).

The master made his conclusions concerning testimony of Deputy Tax Commissioner Patrick J. Cronin while on the stand: 492

"The Master: I have said all along that this kind of testimony is valueless in this kind of a case.

"Mr. Neuman: Yet you take it from Hal-leran.

"The Master: I took it from them as I take it from you, but I am going to find out 493 what this company has invested in this business and I am going to throw expert testimony out of the window" (p. 1103).

(3) *At times the master was unfair in the characterization of the testimony of appellant's witnesses.*

This is particularly true in the following instance (p. 1109): 494

"The Master: Cohen's testimony was perfectly useless. It was simply a recapitulation of the books; there was no necessity for it.

"Mr. Neuman: I must object to the Master's characterization of it at this time." 495

Yet the master accepted in *compact form* the testimony of the respondent's witness Miller, over the objection of the appellants as follows:

"The Master: I think we all found in the Consolidated case that when we had a wit-

496 ness like Mr. Miller on the stand, who had a speech to make, that it was quicker to take his speech as he had prepared it than to ask him questions and bring out the speech by question and answer. The net result of an examination of an hour or two will be that this witness will testify to the matters stated in these pages from two down to the question of working capital, which this question does not comprehend" (p. 258).

497 Likewise, the master, under objection of appellants, took over entirely the direct examination of the defendants' witness Miller on a most important case, "values."

498 "The Master: And if you were asked particular questions relating to the particular items would your answers be as set forth in these pages?"

"The Witness: Yes,

499 "The Master: In other words, are the statements made in these pages now made by you under oath, without repeating them all?"

"The Witness: Yes,

"The Master: So that you are swearing to it?

"The Witness: Yes,

500 "Mr. Neuman: My objection goes, of course, to all the Master's questions,

"The Master: I am asking him in the same manner and to the same extent as I would ask if particular questions were asked to bring out these particular answers.

"Q. If interrogated by me regarding each of these items of undistributed structural costs would you testify regarding each such item to the substantial effect shown in the corresponding note annexed to your summary statement?"

"Mr. Neuman: That is already covered by the Master's questions, and our objection and exception" (p. 259).

(4) *The master even went so far as to absolutely cut off the examination of witnesses:*

This was particularly true of appellant's witness Hine, who testified along the same line as that of respondent's witness Miller.

"Redirect examination by Mr. Tobin:

"Q. Mr. Hine, were you employed in the Public Service Commission at the same time that Judge Ransom was counsel to that Commission?"

"Mr. Ransom: Objected to as immaterial."

"The Master: Objection sustained."

"Mr. Tobin: I do not know, I think you have given great freedom, if the Master please, to counsel on the other side to go into every phase and situation that might possibly exist here as to this witness' testimony, and immediately when we start to ask this question we are shut off."

"The Master: You can take your exception."

"Mr. Cummings: Well, we will. Ask another one."

"Q. Are you acquainted with the different gas-making machines, Mr. Hines?"

501

502

503

504

505

506 " Mr. Ransom: Objected to as not redirect.

" The Master: Sustained.

" Mr. Cummings: Exception.

507 " Q. Do you know from your experience, study and knowledge of the situation exactly how water gas is made?

" Mr. Ransom: Objected to.

" The Master: Objection sustained.

" Mr. Cummings: Exception.

" Q. Can you make it yourself if you have the machinery, the oil and the apparatus?

508 " Mr. Ransom: Objected to as not redirect examination.

" The Master: Objection sustained.

" Mr. Tobin: Exception.

" Q. Could you step into a gas plant that was properly equipped and take charge and operate the gas machines to make water gas?

509 " Mr. Ransom: Same objection.

" The Master: Same ruling.

" Mr. Tobin: Exception.

" Q. Are you familiar with all the apparatus used in making water gas?

510 " Mr. Ransom: Same objection.

" The Master: Same ruling.

" Mr. Tobin: Exception.

" Q. You have made a study, have you, of the latest designs for making water gas—kept abreast of the times, have you, and of the machines for making water gas?

"Mr. Ransom: Same objection. 511

"The Master: Same ruling.

"Mr. Tobin: Exception" (p. 1372).

(5) When Mr. Willard F. Hine was again on the stand on direct examination, the following occurred:

512

"By the Master:

"Q. Did you make an appraisal of the buildings?

"A. I made an appraisal of the cost of these buildings.

"Q. Of the cost? What do you mean by an appraisal of the cost of the buildings; 513 what kind of an appraisal is that?

"A. That is an appraisal of the cost.

"Q. You mean the cost to reproduce?

"A. No, sir.

"Q. Of the original cost?

"A. Of the original cost.

"Q. You mean your estimate of what it 514 cost them originally to build?

"A. No, I set up figures. I can explain probably better by telling just what I did.

"Mr. Chambers: I think if we can go on, we will show what it is.

"The Master: We are going on right now, 515 my way.

"The Witness: The cost as shown by the books of the company.

"The Master: Then I do not want your appraisal of that — next question. How else did you determine the cost?

516 "Mr. Chambers: I object. I think you ought to let me develop this like you did Mr. Miller.

"The Master: I am going to develop all that I want" (pp. 1850, 1478).

517 (6) *The Master refused to admit in evidence the reports of the predecessor company, Newtown and Flushing Gas Company, for the years 1901, 1902 and 1903, notwithstanding the fact that the contents of those reports would disclose some evidence as to the extent and cost of property acquired by the present company when it was merged into and with the Newtown and Flushing Company* (p. 1129).

518 (7) *The Master excluded the evidence of respondent's witness Raynor as to the contents of reports made by the respondent to the State Board of Tax Commissioners, more particularly as to mains and services laid in the year 1919* (pp. 791-794).

519 (8) *The Master erred in the admission of the books of account of the respondent company (complainant's Exhibits 52, 53, 54, 55 and 56), it having been shown that the books were incorrectly kept and that the underlying data on which the books were based was incorrect and that there existed errors in the underlying data which had found their way in the books.*

520 (9) *The Master likewise erred in the admission of complainant's Exhibit 77, in that the facts therein were susceptible of actual proof from the operations of the company, the introduction of this exhibit based entirely on hypotheses was erroneous, incompetent and greatly prejudiced*

the appellants. The said exhibit should not have been received in evidence because the facts themselves were easily ascertainable and susceptible of proof by witnesses now or heretofore connected with the company. The Master thereby dispensing with the degree of proof required by the decisions in rate cases for the proving of one of the vital and essential elements in a rate making case.

The master who tried this case is the same master about whom we contend in the case of *Newton v. Consolidated Gas Co.*, No. 257 present Calendar, that he did not accord the appellants a fair trial. We claim here, as we did in that case, the master, by cutting off examination and unfairly characterizing the testimony of witnesses, did not give appellants a fair trial.

POINT IX.

THE RATE OF RETURN WHICH A PUBLIC UTILITY IS ENTITLED TO ENJOY, AS DETERMINED BY THE COURTS IN NORMAL PRE-WAR TIMES, IS NOT DECISIVE OR CONTROLLING IN THE ABNORMAL WAR PERIOD.

We have discussed the question of the rate of return which a public utility is entitled to enjoy fully in our brief submitted to this court in the case of the *Newton et al. v. Consolidated Gas Company*, (No. 257 on the present calendar). We will not repeat our argument in full again. There we argued that so long as the respondent enjoyed a 6% return over a reasonable period of time, the statute should not be condemned, even though such return fell off in some years, so long as the average was maintained throughout.

526 We cited the *General Business Law* of the State of New York (Sec. 370); which provides for a rate of return of 6%. The decision of this court in the case of *Willcox v. Consolidated Gas Co.*, 212 U. S. 49, held that a rate of return of substantially $5\frac{1}{2}\%$ was ample in normal years.

We submit that either one of the following **527** propositions is sound:

(a) The utility is entitled to enjoy a return of no more than 6% average over a reasonable period, even though in some of the years the return might be less than that; or

(b) If a shorter period is taken, then the return, because of the present abnormal conditions, **528** might be lower than the rate allowed in normal times, and the statute would not be condemned because of a falling off in the return.

There is authority to sustain our proposition that during the war time period (and the year of 1919 considered by the court below was within such period) a rate below 6% is ample.

529 In the case of *Kings County Lighting Co. v. Lewis*, 110 Misc. p. 204, the court found

"That during a war time period in the city of New York $4\frac{3}{4}$ per cent. was a fair return upon the value of the property, including the land of plaintiff used in the public service."

530 We submit that a rate which yields in these temporarily abnormal, unusual and unprecedeted times to respondent a rate of as much as 3% will not require a declaration on the part of the court that the statute is thereby unconstitutional.

We have argued fully in the case of *Norton* 531
et al. v. Consolidated Gas Company of New York,
 (No. 257 on present calendar), the question that
 the burden of proof in these cases is on the
 respondent and that the party assailing the
 statute must establish "beyond any just or fair
 doubt" that the act of the Legislature is confis-
 catory. 532

Willcox v. Consolidated Gas Co., 212

U. S. 19.

Sinking Fund Cases, 99 U. S. 700,

p. 718.

Des Moines Gas Co. v. Des Moines,

238 U. S. 153, p. 163.

533

We shall not repeat the argument here.

POINT X.

FOR THE REASONS ASSIGNED IN THE FORE-
 GOING POINTS THE DECREE APPEALED FROM
 SHOULD BE REVERSED AND THE BILL OF COM-
 PLAINT DISMISSED, WITH COSTS.

Dated, New York, October 10, 1921.

534

CHARLES D. NEWTON,
Attorney-General of the State of
New York,
 Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Solicitor for Appellant NEWTON, 535
as Attorney-General of the
State of New York,
 Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
 CLARENCE R. CUMMINGS,
 of Counsel.



Office Supreme Court U. S.
FILED
OCT 26 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term—1921

Calendar No. 296

CHARLES D. NEWTON, as Attorney-General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

vs.

NEW YORK & QUEENS GAS COMPANY, *Respondent.*

BRIEF ON BEHALF OF APPELLANT DANA WALLACE, AS DISTRICT ATTORNEY OF THE COUNTY OF QUEENS.

JOHN P. O'BRIEN,
Corporation Counsel,
Solicitor for Appellant, Dana Wallace,
District Attorney of the County of
Queens,

Municipal Building,
New York City.

AMES A. DONNELLY,
L. MALDWYN FERTIG,
of Counsel.

SUBJECT INDEX.

	PAGE
Statement	1
Suit to declare void Chapter 125, Laws of 1906	1
Respondent claims rate fixed by act of 1906 has been and is inadequate; that earnings have never been sufficient to provide 6% return; no dividends to stockholders, but devoted income to expansion of business; has 10,000 customers; in 1918 used 327,585,600 cubic feet of gas; alleges no adequate remedy at law; complaint verified April 7, 1919.....	2
Evidence taken of operating cost year 1919, first five months year 1920; no evidence that statute had been confiscatory since company organized; objected to proof to the contrary; appellants submitted data October, 1906-1920; Master's report July 16, 1920; Court's opinion November 3, 1920; findings based on the year 1919....	3
Constitutionality of act upheld by this Court; list of defendants; instructions to Master; exceptions filed to Master's report; judgment of court below November, 1920	4
In event of reversal of judgment; statements of moneys collected to be filed.....	5
Bond to be filed with the clerk of court; provisions of decree to be observed only in case appeal taken promptly; appeal taken within thirty days; exceptions to Master's report filed.....	6
History of respondent; acquired property by purchase of stocks 1904; successor to Newtown and Flushing Gas Company which in turn succeeded others; one plant of predecessor located in Flushing since 1859	7

Respondent acquired stock offered by Henry R. Wilson; consideration stated; provision to be inserted in the bonds; respondent became possessed of real and personal property and only of franchise right; extent of the business developed in 1904 not on the record	8
Summary of lack of proof; method used by respondent in attempting to prove operating expenses; contentions of appellants..	9
Statement showing Master's mind was made up; no justification for admission in evidence of books; no audit made of books; underlying audit not proved; extent of property used in the service not proven; witness called; not competent.....	10
No other witness called to prove property; witness Miller attempted to prove distribution system, but Master condemned his plan; no witnesses called to prove receipt of production materials; no competent evidence as to labor costs; no proof of depreciation requirement; instructions as to amount to be set aside received from board of directors.....	11
Quantity of gas distributed not proved; evidence of engineer Woods rejected; Master intended to have manufacturing engineer state facts; no such witness called; no proof of amount of gas sold; no meter-readers called; no ledger clerks called; no proof that salaries or wages are reasonable; record deficient in proof that manufacturing plant well designed, properly operated or of right type.....	12
I. No Proof of Reasonable Manufacturing Cost	13
Allegation as to cost does not prove reasonableness of cost; citation from Illinois case; no proof that operations are effi-	

	PAGE
client; evidence regarding manner in which coal is received.....	13
Method of unloading coal; an important item of expense; method of transferring coal from mine to plant; cost \$1.25 per ton; no railroad siding.....	14
Witness admitted could be reduced to fifty cents per ton; some increase required in investment; every ton unloaded costs seventy-five cents more than reasonable if railroad siding put in; further reduction if plant properly located; plant location possibly correct at some remote period; conditions now condemn location of plant; consumer made to pay excessive costs....	15
Book cost may be higher than shown by opinion testimony of witness; opinion testimony concerning quantity of coal needed; saving by proper methods of unloading; 9,500 tons per annum; proof of this contention	16
Witness attempts to explain valuation.....	17
Plant is not on navigable water; witness admits it is badly located, but claims that it is there; in arriving at his price did not consider all the men employed.....	18
Witness took figure from records of company; cost of \$1.25 was only fifty cents some years ago; present condition shown to be abnormal.....	19
Contention of appellants regarding cost of handling coal; management condemned; past profits so high respondent did not worry about excessive costs; no proof that coal paid for is actually received.....	20
Possibilities of coal being diverted from respondent's use; instances cited.....	21
Other instances of probable loss of coal.....	22
System of accounting for coal used condemns plan of reporting operations; testimony of Works Superintendent; testimony relating to system of measuring coal; testimony inconsistent.....	23

No gas makers called as witnesses to prove entries on works report sheet.....	21
Impracticable for superintendent to do what should be done in keeping track of coal used	25
No check on coal used in the manufacture of gas other than monthly inventories; inventories cannot be checked; records not preserved; failure of Spear to bolster up weak testimony of Morrison.....	26
Testimony of Spear; unsatisfactory witness	27
Respondent attempts to prove operations reasonable by offering opinion testimony; witness trained in plants of much larger size than that of respondent; testimony of engineer is an estimate based upon hypothetical plant; no examination of records by him except as to cost of handling coal from wharf to works.....	28
Wood's testimony not convincing.....	29
Contentions concerning testimony of Woods	30
Argument concerning Woods' estimate of operating costs	31
Witness Woods allows for men not continually employed by respondent.....	32
Woods' evidence clashes with his testimony in another case quoted; comparison of testimony in two cases.....	33
Further instances of inefficient plant operation	34
Morrison's testimony so confused no sense can be made of it; testimony supporting this contention	36
No testimony showing computation covering coal used checked against amount of coal paid for; Master ignores errors admittedly made in the book records.....	37
Opinion testimony of Woods contradicted by concrete evidence of general manager.	39
Woods inflated costs by assuming poor quality coal	41

	PAGE
Woods' opinion testimony not supported by evidence of his associate, who purchases coal	44
Woods' testimony also contradicted by general manager Spear.....	45
Superintendent would know if coal was of poor quality but, he was not asked for his opinion	46
Saying to respondent if proper quantity of coal used in production of gas.....	46
A cent per thousand here and there will decide this case against respondent; loss reported by Master wiped out if respondent saves three cents or somewhat less in handling coal or saves any amount of coal used; Master uses book costs and relies on Woods' hypothetical figures to substantiate them; Woods demonstrated book costs unreasonable; boiler coal too high; this saving alone wipes out deficit.....	47
Woods' evidence difficult to follow; he assumes coal handled, although liquid is used requiring no hauling; principal cost of gas is in the expense for oil; Woods' estimate higher than book cost.....	48
Evidence showing purchases of gas oil are made; contracts made by vice-president of Consolidated Gas Company; no evidence that this plan is fair to respondent; contentions of appellants.....	55
Even if changes made in quality of gas and kind of oil used, Standard Oil Company will continue to get all the contracts....	59
Master not impressed with ability of other companies to make more favorable contracts	62
No proof as to quantity of oil used in making gas; errors disclosed in Morrison's monthly reports upon which books are based	66
Serious doubt cast upon records of the respondent; Teele's tabulations based upon	

	PAGE
books which are made up from Morrison's incorrect records; contention concerning correct amount of oil; saying to respondent \$3 cents on each M cubic feet of gas sold	67
After oil, next important item, in cost of gas is labor at works; no proof of amount of labor used	68
Master thought better proof was possible in instant case than in Consolidated Gas case	69
No witnesses called to prove original records of labor cost; Teele's work on accounts described	72
Superintendent of plant called; testimony covers 8 pages—2 pages devoted to qualifications; testimony concerning labor expense very indirect	74
Cross examination of superintendent reveals his lack of knowledge of accounts to which cost should be allocated.....	75
Superintendent's assertion that he pays only men employed and that he needs the men is not proof that books accurately reflect the reasonable expense of producing gas	76
Master accepted Woods' estimate as evidence that book records of production are reasonable	78
Woods' figures on labor shown to be unreasonable	88
Abnormal period; testimony of general manager contradicts that of expert witness..	89
Contention concerning fair labor cost; saying in labor cost, \$5,000.....	90
Woods, for respondent, could not vouch for reasonableness of repair cost reported on books; he estimated a lower requirement; Woods' estimate, however, is just twice what he testified to as the reasonable amount in Consolidated gas case as shown by record	91

	PAGE
Contention concerning need for close scrutiny of repair cost; comparative figures for previous years; 1919 expense obviously unreasonable; even adding 50% to average of ten years, cost should not exceed 3.5 cents per thousand as compared with Master's finding of 7.35 cents; saving 3.85 cents is equivalent to \$14,600 per annum	92
Cost of gas lost or gas not accounted for; Master's finding clearly erroneous; he placed no reliance on Woods' testimony ..	95
Comparison with previous years' operations; if average used allowance should be 8%; reference to opinion of Judge Hand in Consolidated Gas case; he found 4.1% sufficient, although the Master recommended a greater allowance; Judge Mayer in instant case also disagreed with the Master but did not make sufficient reduction; year 1919 is abnormal; opinion testimony should not be relied upon; allowance should be based upon past operation during normal years	96
Cost to distribute gas; court below disallowed certain items; other deductions should be made; in addition to reduction from 42.07 cents per thousand to 37.15 cents, there should be deducted for uncollectible bills 0.4 cents per thousand; interest on consumers' deposits should be disallowed, amounting to 0.48 cents per thousand	97
Table summarizing adjustments to operating cost	98
II. The Company has had fair average return and a return more than sufficient to overcome claim of confiscation:	
Citation from Municipal Gas Company case, Case in line with decisions handed down by the highest court	99
	100

	PAGE
Points to be considered in a case involving confiscation; cases cited.....	101
Contention of appellants in respect to aver- age return	102
Complete account must be taken of present earnings, future prospects and particularly of past earnings and returns realized under the statutory rate; evidence clearly shows excessive returns earned by respon- dent; earlier excesses should be considered as accumulation to equalize profits over a period of years; intent of the legislation.....	103
Evidence offered by appellants to show past earnings; Master refused to consider rele- vancy of these facts; based his opinion upon operations of a single year; Master's findings clearly inconsistent with the in- tent of the legislation; if Master's unsound opinion should be sustained a gross injus- tice would be placed upon gas consumers; policy of the legislature when it fixed rates in 1906	105
Respondent entitled to fair average return on its investment and on no more; should have conserved excessive earnings to pro- vide for lean years.....	106
The purpose of the acts fixing statutory rates and providing for Public Service Commis- sion; present rate should be continued un- til all previous excessive earnings have been consumed; or even longer unless without any doubt the further require- ments of service and the equitable treat- ment of investors would necessitate an an- nulment of the rate.....	107
Table showing return on rate base for 13½ years	108
Excess earnings of \$341,297.26 should be treated as contribution by consumers, credit balance to cover temporary annual deficiencies in earnings during abnormal periods	109

	PAGE
The period selected by respondent in this bill of complaint should be considered in ascertaining if fair return has been had on the investment; Master did not take this into consideration; claims of respondent in its bill of complaint; respondent offered not one scrap of evidence in support of this claim; respondent practically directed by Master to confine its testimony to 1919; the showing in the record supports our contention that judgment of lower court should be reversed.....	112
III. The period selected by the Master is altogether abnormal	113
One year's operations no true criterion of the reasonableness of legislation, particularly where year is abnormal; abnormality disclosed by the record.....	113
Record cited to support this contention....	124
Cases cited showing abnormal period is not relied upon by commissions or courts when fixing fair rates; conditions are getting back to normal; cases cited	130
IV. No proof of the fair present value or investment in property	131
The question to be determined; what the courts consider	131
Master disregards depreciation of property in use or installed prior to 1904.....	133
Proof of cost to reproduce property new as of January, 1920, not entitled to any consideration in view of proof based upon operations for the year 1919.....	135
Company not entitled to a return on investment which is appreciated to the extent of permitting unjust rates to the public...	137
Tendency of courts to modify reproduction method so as to bring it nearer to actual cost	138

Decisions opposed to reproduction cost method for rate-making purposes.....	140
Criticism of Miller's use of prices as of January, 1920, made applicable to period preceding and presumed to apply to period to follow; further criticism of reproduction cost-new method with reference to overhead charges represented in the case of developing the company's business and carried in operating expenses which were contributed by consumers.....	142
Reproduction cost-new method assumes theoretical elements which do not and cannot exist in reality.....	143
Condemnation of reproduction cost-new method by Honorable Charles E. Hughes	145
Testimony of respondent's witness to the effect that there is no depreciation.....	150
Criticism of Master's acceptance of claim of respondent as to finding for franchise and rights, overhead expenses and other intangibles as to which the record is lacking in proof	154
V. Master's failure to take into account depreciation	157
Judicial authority for deducting depreciation	159
Criticism of Master's views on obsolescence and inadequacy	160
Failure to set aside depreciation reserve of no consequence	162
Judicial authority for same.....	163
Analysis of Master's criticism of necessity for depreciation reserve.....	166
Application of no depreciation theory to Ford automobile	167
O'Conner's admission as to depreciation of buildings	169

	PAGE
VI. Appellants have not had a fair trial	169
Critical review of Master's findings reserved to Court	170
Master hasty and time very valuable; an advance knowledge of Master on questions to be put by counsel.....	171
Master's characterization of statutory law; Master's impetuous and injudicious use of language	172
Master's virulent criticism of counsel's questions	173
Master's assumption of his own knowledge of the gas business	174
Master's humiliating criticism of counsel and characterization of counsel's position as nonsense	175
Further citation showing Master's injudicious use of language.....	175
Master forces immediate cross-examination of witness, assuming his own ability under the circumstances to take up the cross-examination at once with ease.....	176
Master states weakness of testimony about to be given, taking advocate's part.....	177
Master's undue restriction of cross-examination by counsel.....	180
Master's indifference as to the proper qualification of witnesses	181
VII. Respondent's books of account, not proof of their contents	182
Master's finding of accuracy of contents of books	183
Books admitted over objection.....	183
Master's call for better proof.....	184
Spear's testimony described only system of entries relating to cost of materials in operating ledger	185
Master suggests better and more proof....	185

	PAGE
Teele's testimony covered only percentage check	186
Raynor's test of accuracy of books covered only monthly trial balance	186
Foy's testimony only as to entries in his handwriting	187
Foy never checked back any underlying data. Took what was given him as correct	187
Books not of original entry, and argument against their admission as proof	188
VIII. Statute presumed to be constitutional. Burden of proof of respondent beyond reasonable doubt	189
Cases cited	190

Table of Cases and Statutes Cited.

Atlantic Coast Line R. R. v. Florida 203 U. S. 236	190
Brymer v. Butler Water Co., 179 Pa., 231, ...	139
Brooklyn Borough Gas Co. v. P. S. C., 17 N. Y. State Department Repts., 81	145
Brooklyn Heights R. R. Co. v. State Bd. of Tax Commrs., 69 Misc., N. Y., 646, 657,	162
Cedar Rapids Gas. L. Co. v. City of Cedar Rapids, 223 U. S., 655,	99
In re Consolidated Gas E. L. & P. Co., P. U. R. 1921, A-649	127
Chicago Union Traction Co. v. City of Chicago, 199 Ill., 579	131
City of Knoxville v. Knoxville Water Co., 212 U. S., 1, 10	159, 189
Chicago St. Ry. Co. v. Tompkins, 176 U. S. 167, ...	189
Darnell v. Edwards, 221 U. S., 564	99, 101
Detroit United Railway v. Detroit 248 U. S. 442	189
In re Freeport Gas Co., P. U. R. 1921, A-687, ..	127
In re Hammond Water Works, P. U. R. 1919, A-180	124
In re Home Telephone Co., P. U. R. 1919, A-243	125

	PAGE
In re Jefferson City Light, Heat & Power Co., P. U. R. 1918, A-722	129
In re Kingston Gas & Elec. Co., P. U. R. 1921, B-76, 82.....	128
Kings County Lighting Co. v. Lewis, 110 Misc., (N. Y.) 242	130
Kansas City So. Ry. Co. v. U. S., 231 U. S., 423, 448	163
In re Long Island Railway Co., P. U. R. 1918, 651	126
Lincoln Gas Co. v. Lincoln, 223 U. S., 357.....	190
Louisville & Nashville R. R. v. Garrett, 231 U. S., 298.....	190
Louisville & Nashville v. Finn, 235 U. S., 601, 607	190
Municipal Gas Co. v. P. S. C., 225 N. Y., 89..	99
Matthews v. Board of Corporation Commis- sioners, 106 Fed. Rep., 9.....	126
In re Metropolitan, West Side Elev. R. Co., P. U. R. 1921, B-293.....	127
Minnesota Rate Cases, 230 U. S., 352.....	189
Missouri Rate Cases 230 U. S., 474, 499.....	190
N. J. Board of Public Utility Commrs., P. U. R. 1918, E-915.....	125
In re Northern California Power Co., P. U. R. 1918, C-394	126
Northern Pacific Ry. Co. v. Lee, 199 Fed Rep. 621, 631	189
Nolen v. Reichman, 225 Fed Rep. 818.....	190
Omaha & C. B. S. R. Co. v. Nebraska State R. Com., P. U. R. 1919, F-308.....	101
P. U. C. ex rel. City of Springfield v. Spring- field Gas & Elec. Co., 291 Ill., 209.....	13
In re Pacific Power and Light Co., P. U. R. 1918, 670	125
Public Utility Commission ex rel. City of Springfield, etc., 291 Ill., 209.....	139
Peo. ex rel. Jamaica Water Supply Co. v. State Bd. of Tax Commrs., 196 N. Y., 39, 57	159
Peo. ex rel. Queens County Water Co. v. Wood- bury, 67 Misc., (N. Y.) 490, 493.....	160

	PAGE
Palatka Water Works v. Palatka, 127 Fed. Rep. 161	189
Peo. v. McDonald, 52 N. Y. S. (N. Y.) 899,	190
In re Queens Borough Gas & Elec. Co., P. U. R. 1918, E-891	129
Railroad Commission of Louisiana v. Cumberland T. & T. Co., 212 U. S. 423	189
In re Salt Lake & U. R. Co., P. U. R. 1919, C-565	125
Steenerson v. Great Northern Ry. Co., 72 N. W., 713, 721	126
Smyth v. Ames, 169 U. S., 546	130, 131
San Diego Land and Town Co. v. National City, 174 U. S., 739	131, 189
San Diego Land and Town Co. v. Jasper, 189 U. S., 439	131
Stanislaus County v. San Joaquin and Kings River C. & L. Co., 192 U. S., 201, 214	131, 190
San Diego Water Co. v. City of San Diego, 118 Cal., 556	138
Simpson v. Shepard, 230 U. S., 352	143
Shepard v. Northern Pacific Ry., 184 Fed. Rep. 765	189
Sinking Fund Cases, 99 U. S. 700	190
Seaboard Air Line Railway v. Florida, 203 U. S. 261, 270	190
Tri-States Telephone & Telegraph Co., P. U. R. 1919, C-5	124
Turnpike v. Banford, 164 U. S., 578	126
In re Union City Telephone Co., P. U. R. 1918, E-669	126
Wilcox v. Consolidated Gas Co. of New York, 212 U. S., 19, 41	4, 137, 189
West Virginia Traction & Elec. Co., P. U. R. 1919, E-95	124
In re Winifrede R. Co., P. U. R. 1918, C-156,	126
Wilkesbarre v. Spring Brook Water Co., 4 Lack. (Pa.) Leg. News, 367	139

Supreme Court of the United States,

(OCTOBER TERM, 1921)

CHARLES D. NEWTON, as Attorney General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,
Appellants,
vs.
NEW YORK & QUEENS GAS COMPANY,
Respondent.

No. 296.

Appeal from the District Court of the United States for the Southern District of New York.

Brief on Behalf of Appellant Dana Wallace, as District Attorney of the County of Queens.

Statement.

This is a suit in equity, instituted by the above-named respondent against the appellants herein, to have declared unconstitutional and void, as to respondent, Chapter 125 of the Laws of 1906, upon the ground that the rate of one dollar (\$1.00) per thousand cubic feet required by said statute, at which gas shall be supplied to private consumers in the territory served by respondent, is in contravention of Section 10 of Article I of the Constitution of the United States and of the Fourteenth Amendment to the said Constitution.

In its bill of complaint, respondent claims (XVI) that "the maximum price of one dollar (\$1.00) per thousand cubic feet for gas, fixed by the said Act of 1906, has been, is, and will continue to be wholly inadequate, in that it does not permit your orator to earn a reasonable return upon the fair value of its property devoted to the public use." Furthermore, it specifically claims (XIV) that during no year since its organization, in 1904, have the earnings been sufficient to provide a return of as much as six per cent, upon the reasonable value of its property; although in paragraph IX, thereof, it alleges that "since its organization in 1904, it has managed the business prudently but has paid no dividends to its stockholders, has devoted to the development and expansion of the business certain income which might have been used for dividends." In a general way, it also claims that the reasonable value of its property, one million, four hundred ninety-two thousand, nine hundred seventy-six dollars (\$1,492,976) should have added thereto for going value an aggregate deficiency in earnings below seven and one-half per cent. upon the value of the said property, in the sum of at least \$300,858.41 (X).

Respondent asserts (XVIII) that it has more than ten thousand customers to whom it is daily selling gas, the amount distributed and sold during the year ended December 31, 1918, being 327,585,600 cubic feet.

Respondent alleges (XIX) that it has no adequate remedy at law for the injury which would result from the further enforcement of the said Act, and that such injury would be irreparable.

The bill of complaint was verified April 7, 1919; and after several adjournments, from July 15, 1919,

to April 15, 1920, the taking of testimony was begun before the Special Master, April 26, 1920, and continued to June 28, 1920, being spread upon 2373 printed pages.

The Master took evidence of operating cost for the year 1919 and the first five months of the year 1920. There was also submitted, testimony as to the cost of oil, coal and other materials from 1906 down to June, 1920.

No evidence was offered by respondent in support of its claim that the statute had been confiscatory as to it since the date of organization, but, to the contrary, it objected to such proof (R. 1018, et seq.), while appellants submitted data showing the operating results, the unit quantities of materials used, the unit costs thereof, and other information as to the revenues and expenses of respondent during the years from 1906 to 1920 (R. 47 [79]).

The report of the Master was submitted to the Hon. Julius M. Mayer, District Judge, July 16, 1920, and the opinion of the Court below is dated November 3, 1920.

The Master concluded to base his findings as to the cost of making and distributing gas especially upon the operations and alleged cost for the year 1919, in the belief that the cost in the year 1920 will be in excess of the figures he reaches for the year 1919 (R. 48, [79½]). The learned Judge approves of the finding and states:

“The year 1919 is in this case a sufficient basis for the calculation of the cost of production and the rate base for a future long enough to call for some judicial action.”

(R. 110 [193]).

The constitutionality of Chapter 125 of the Laws of 1906 was upheld by this Court in a suit instituted by the Consolidated Gas Company of New York to have such statute declared confiscatory. The decree of the Circuit Court restraining the public officials from enforcing the provisions of the Act was reversed without prejudice to the bringing of a new suit "when practical experience of the effect of the Act by actual operation might prevent the plaintiff's obtaining a fair return * * *."

Willcox v. Consolidated Gas Co. of N. Y., 212 U. S., 19.

In the suit commenced in the Court below the appellants herein, the Attorney-General of the State of New York, the District Attorney of the County of Queens, and the Public Service Commission of the State of New York for the First District, who are charged with the prosecution of violations of the statute, were made defendants. The Special Master was appointed by order of Mayer, J., dated the 23d day of May, 1919, to take all of the testimony and evidence with respect to the issues, make all needed computations, fully find the facts and report to the Court below all the testimony and evidence received by him, together with the findings of fact and his recommendations as to the facts and the law. Exceptions to the Master's reports and opinion were filed both by appellants and respondent, and, thereafter, on the 3d day of November, 1920, an opinion was filed by the Hon. Julius M. Mayer, District Judge, this being amended in certain particulars on November 16, 1920. Judgment was entered by the Court below November 19, 1920 (R. 117 [208]), wherein and

whereby it is provided that appellants, their successors, etc., be restrained from attempting to enforce Chapter 125 of the Laws of 1906, or from doing any act or thing interfering with the right or authority of respondent forthwith to charge, bill, collect and receive for gas any rate which it might lawfully charge or receive if the provisions of the said act relative to the rate were not operative.

The judgment further provides, in the event that an appeal from the decree is taken by defendants, the plaintiff shall keep true and correct accounts and records of all gas sold by it and of all moneys received by it for gas sold by it, so as accurately and completely to show the moneys received by it for gas sold by it from and after the date of the decree, in excess of the sums which would have been received for such gas if the same had been sold at the rate of one dollar (\$1.00) per thousand cubic feet of gas sold, together with the names and addresses of the consumers from whom such moneys are so collected, in so far as such names or addresses are known to the respondent or appear upon its books and records; "and such accounts and records shall, upon application to this Court, be at all reasonable times open to the inspection and audit of the defendants" (VI) (R. 119 [209]). The judgment further provides that if, within the time prescribed, an appeal from the decree is taken by defendant, the plaintiff shall, on the 15th day of December, 1920, and on the 15th day of each month thereafter, file in the office of the Clerk of the Court below a sworn statement showing the moneys received by it during the preceding month, for gas sold by it, in excess of the sums which would have been received for such gas if the same

had been sold at the rate of One Dollar (\$1.00) per thousand cubic feet.

It is further provided that a bond shall be filed with the Clerk of the Court, conditioned for the repayment to the consumers, in the event that the decree is reversed on appeal and it is ultimately decided that respondent is not entitled to judgment, of the respective sums of money collected in excess of the One Dollar (\$1.00) rate, together with interest at the rate of six (6) per cent., the obligation of such surety upon and under such bond to be in the sum of Two Hundred Thousand Dollars (\$200,000), and when the excess moneys so collected shall aggregate said amount the appellants may make application to the Court for an additional bond or security.

It is provided in the judgment that plaintiff shall be required to observe these provisions of the decree only in case an appeal is taken by the defendants, or any of them, within thirty (30) days from the entry of the decree, and that the defendants shall perfect and prosecute any such appeal and print and file the record and all necessary papers to that end, promptly and without delay, and shall, with all convenient speed thereafter, serve a notice of application to this Court to advance the said appeal upon the calendar. Defendants' appeal was taken within thirty (30) days after the entry of the decree herein and said appeal has been perfected (R.124).

Exceptions to the Special Master's Report were taken by the defendants and were filed in the office of the Clerk of the Court below on the 6th day of August, 1920 (R. 60-102). Complainant also filed exceptions to the Master's Report and Opin-

ion, in the office of the Clerk, on the 9th day of August, 1920 (R. pp. 104-106).

History of Respondent.

Respondent is a corporation, duly incorporated (Complainant's Ex. 1) on or about July 7th, 1904 (R. 1721), for the purpose of manufacturing and supplying gas for lighting the streets and public and private buildings of cities, villages and towns in the State of New York and particularly within the Borough of Queens, City of Greater New York. The amount of capital stock was at that time fixed at Six Hundred Thousand Dollars (\$600,000) of the par value of One Hundred Dollars (\$100) each.

On or about July 18th, 1904, respondent acquired, by the purchase of stocks and bonds, and now operates, a gas production property with a system of distribution mains located in and serving the former village of Flushing in the third ward of the Borough of Queens in the City of New York.

Respondent is the immediate successor to the Newtown and Flushing Gas Company which in turn was the successor to a number of companies that had supplied gas in various parts of the Borough of Queens. (R. 155-162 [15-25].) The manufacturing plant of one of said predecessor companies has been located at the same point in the village or town of Flushing since about the year 1859. (R. 163 [26].)

On the 12th day of July, 1904, and theretofore, the Newtown and Flushing Gas Company owned and used certain lands, buildings and other real and personal property for, and was actually engaged in, the manufacture, sale and distribution of gas in the Borough of Queens, City of New York;

and in addition it owned franchises and rights to be a corporation and to lay mains in certain specified districts for the purpose of supplying gas to the inhabitants thereof. It had at that time developed the gas business in the Third Ward of the Borough of Queens, and had secured customers sufficient in number to constitute a going concern with a business attached.

Respondent acquired all the capital stock and all of the outstanding bonds of said Newtown and Flushing Gas Company, as the result of a proposition by Henry R. Wilson who offered to sell and deliver the entire outstanding stock (to wit: \$300,000 common and \$50,057 14/100 preferred) with the entire outstanding bonds (to wit: \$300,000) for \$1,250,000, payable in \$600,000 par value capital stock of the purchaser and \$650,000 par value of its corporate five per cent. bonds. The said H. R. Wilson in the aforesaid proposition also made the following provision: "that said bonds should be secured by your first mortgage, and shall be of an issue of not exceeding \$1,000,000 secured by such mortgage; all other details of said bond and mortgage to be as approved by you." (R. 1722 [2711].)

On or about July 18, 1904, Respondent merged into itself the said Newtown & Flushing Gas Company. By virtue of the merger and of the statute pursuant to which it took place, respondent became possessed of and became the owner in fee simple of all of the real and personal property owned by the Newtown and Flushing Gas Company, the owner of the franchises and rights then owned or enjoyed, and the owner of the business established and developed. The extent of the business at that time developed does not appear in the record.

SUMMARY OF LACK OF PROOF.

The method employed by respondent in attempting to prove its operating expenses consisted in having a witness for respondent submit to the appellants in advance of the hearings a series of summaries consisting of tables that are condensations of the figures and statements or other data contained in the general account books of the respondent.

It was assumed by the Master and the Court below that respondent's expert accountant having stated that the books have been kept according to the prescribed rules of the uniform system of accounts of the Public Service Commission, each and every one of the entries therein are accurate, and the expenditures all legitimately made. This method of proof throws the burden wholly upon the appellants, on the theory that they or their experts had an opportunity to scrutinize and should have examined the tabulations of respondent's accountant and made such objections to or criticisms of the partial transcripts of the books as they deemed necessary.

The method of proof in effect, therefore, is something of this sort: The gas company, prepares a series of tables based upon the books, offers them in evidence and says to the appellants, "Now, find out what's wrong, if anything, with all of this, and point out in what respect anything is incorrect." The Master (R. 1255) indicated this was his attitude during the trial, and was consistent in his belief as is shown by his opinion (R. 50 [83]).

We respectfully submit that this method of proof entirely throws the burden upon those opposing the attack upon the statute and does not require those complaining of the unconstitutionality of the

statute to shoulder the burden that is justly theirs.

That the Master had his mind made up that all of the data submitted on the part of the company without detail proof was *prima facie* evidence of its claim appears from his statement upon the motion to dismiss.

The Master—* * * The complainant has proven the cost of making gas, on the evidence as it stands, that it costs them more to make gas than they sell it for or are compelled to sell it for. (R. 962 [1479].)

There is no justification for the admission in evidence of respondent's books. An expert accountant, in no way connected with any branch of respondent's business and having no personal knowledge of any of the transactions recorded in said books, testified to the effect that the entries are copied from underlying data and are arithmetically correct. That witness did not even make an audit of the books of account.

Evidence of mathematical accuracy is no proof of the truth of the data in said books. The underlying data back of the books was not proved by any witness, and the tabulations of the witness Teele, which are limited transcripts of the books, were lacking in proof to the extent that the books themselves were not proved (R. 230).

Respondent failed to prove the extent of the property used and useful in the public service. It called an assistant engineer in the employ of the parent Consolidated Gas Company, Herbert W. Alrich (R. 166 [32]), who presented a diagram of respondent's property purported to be owned and used as of January 1, 1920 (R. 168 [34]). We contend that Alrich is not competent to testify concerning the use and usefulness of the property because he does not know how much gas is sold per

annum and therefore cannot know if the gas production property described very generally by him is actually used and needed in serving the gas consumers (R. 173 [44]).

No other witness was called to prove that all of the plant included in the rate base or in the books of account is used and useful in giving gas service.

Alten S. Miller, an expert employed by respondent, testified to the method used by him in ascertaining the extent of the distribution system, but his plan for securing this data was condemned by the Master (R. 235 [181]). No witness was called to prove that the gas mains in the streets are suitable for the purpose and of no greater extent or capacity than is called for by the needs of the present or prospective consumers of gas.

Respondent called no witness who actually receives the coal, oil and other expensive materials so largely used in the manufacture of gas. Its superintendent, Martin Morrison, merely described, in a general way, the system used in accounting for the receipt and use of materials and in recording the time of the men employed in the plant operations. No witness was produced who could swear to the accuracy of the shop labor costs or as to the allocation of the expense as between capital, operating or depreciation reserve accounts.

No proper proof was submitted as to the need for setting aside certain sums annually to take care of depreciation, the evidence being merely to the effect that the bookkeeper entered in the books a charge in the amount that he was instructed to set aside by the officers of the respondent, who, in turn, received their instructions through the action of the Board of Directors (R. 264 [197]).

The amount of gas sent out to the system of

mains was not properly proved. The witness Woods, consulting engineer to respondent and engineer of manufacture to the Consolidated Gas Company, attempted to show that he knew the amount, but the Master rejected this evidence and said he would have the manufacturing engineer produced to give the facts (R. 273 [212]). No such engineer was subsequently called, and the superintendent of the works when on the witness stand was not interrogated as to the amount of gas sent out.

Respondent failed to prove the amount of gas sold. Not one of its meter readers was called to testify as to the system used in indexing the meters and recording the amount of the consumption by individual gas consumers. Not one of the consumers' ledger clerks was called to testify to the accuracy of the system used in recording the gas used and in computing the amounts of the bills.

Respondent offered no proof that the salaries paid to its officers and the wages paid to its employees are fair and reasonable.

The record is deficient in proof that the manufacturing plant is reasonably well designed, properly operated, or of the right type to produce gas economically.

POINTS

I.

Respondent failed to prove that its cost to manufacture gas is reasonable.

The *allegation* by respondent that certain sums have been expended in the production and distribution of gas is not sufficient to establish that the statutory rate for gas service is confiscatory. The burden is upon respondent to *prove* that its management of the property has been reasonable.

"The property of the public utility is devoted to the public use. There is always the obligation springing from the nature of the business in which it is engaged,—which private exigency may not be permitted to ignore,—that there shall not be an exorbitant charge for the service rendered * * *. No direct parallel can be drawn between a private corporation and a public service corporation, for the reason that to a greater or lesser extent the public has acquired an interest in the use of the property devoted to public use, and correlatively the company owes a duty to the public as well as to its stockholders and must charge no more than a reasonable rate for service rendered (citing *Havre de Grace and Perryville Bridge Co. v. Towers* (Md.) 103 Atl. 319)," [P. U. C. *ex rel.* City of Springfield v. Springfield Gas & Electric Co., 291 Ill. 209.]

Respondent has not proved that its operations are carried on efficiently.

As to the manner in which coal is received at the plant:

"Q. How is coal received at this plant of the New York & Queens Gas Company? Is it received directly from a railroad connection up to this time, or is it brought by trucks or wagons?

"A. It is brought by barge and unloaded at the dock, on Flushing Creek, and then carted from there in automobile trucks to the plant and stacked in the yard, in the coal bins.

"Q. How far is the point of unloading of the barges?

"A. About half a mile. At the present time they have got to cart it over that, on account of the construction of a big sewer which blocks the way. They have got to go a round-a-bout way to get to it."

(R. 181 [57].)

The Court will take note of the fact that coal is one of the important items of expense in the production of water gas. Respondent's plant is located inland. The coal that it receives comes to tidewater in railroad trucks which are dumped into barges each containing about 600 tons. These barges are then transferred by tug to a dock on Flushing Creek, and the coal is there unloaded on to automobile trucks or wagons for transportation to the yard or coal bins at respondent's plant. While the trial was in progress the automobile or wagon haul was considerably over half a mile in length.

George E. Woods, engineer of manufacture of the Consolidated Gas Company of New York and consulting engineer to respondent in its plant operations, testified to the manner of handling coal at the dock and into storage, and he computed the cost per ton for such labor, handling and cartage at \$1.25. He was asked if this unreasonable expense could be reduced if coal was handled to the plant by means of a railroad siding:

"Q. Assuming that a new railroad siding and appurtenant coal-handling facilities are installed at this plant, as has been indicated, would this expense of labor, handling, carting, and so forth be increased or decreased?

"Mr. Neumann—I object as incompetent, irrelevant and immaterial.

"The Master—Overruled.

"Mr. Neumann—Exception.

"A. It would be reduced.

"Q. About how much; have you figured it?

"A. It would be reduced to about 50 cents a ton, I should say.

"Q. But that would involve an increase in the investment in land and apparatus?

"Mr. Neumann—One moment.

"A. It would."

(R. 411 [418].)

The evidence is conclusive that every ton of coal put into this gas plant, or into Woods' hypothetical plant, costs 75 cents more than it would, if the plant was even moderately well equipped to handle raw material used in the production of gas. We draw particular attention to the fact that Woods was merely asked by counsel for respondent if the cost of handling coal would be reduced if the plant was provided with a railroad siding. No doubt this Court will want to know why the plant is not provided with railroad facilities; but we also believe it will require to know why this gas plant is not located on the waterfront, from which it is distant one-half mile. What right has respondent to retain, as a site for its production plant, the land that was selected by one of its predecessors over sixty years ago? Possibly, at that remote period it did not much matter if the plant was on a site having no frontage on tidewater and no connection with the railroad.

Things are and for many years have been vastly different. Why should the consumer pay \$1.25 to unload and haul every ton of coal delivered to this plant, when the fair cost of unloading coal from barge direct to coal pits would not exceed 10 cents per ton?

There is no proof on the record that the cost of handling coal by the present method is not even higher than \$1.25 per ton, because the evidence introduced on behalf of respondent is confined, in this respect, to the testimony of engineer Woods, who, so far as the records show, has had no ex-

perience whatever in handling coal in this way. He certainly does not do it in such an antique way at the plants directly under his control.

During the year 1919, respondent sold 336,241,400 cubic feet of gas (R. 39 [65]). Woods assumes that for each thousand cubic feet of gas *made* there is required 34 pounds of generator coal, and 22 pounds of boiler fuel, which means, allowing for gas lost, that about 9,500 gross tons of coal are unloaded per annum. A saving of only \$1.00 per ton would therefore be equal to \$9,500 in the year 1919.

Evidence of the excessive cost to handle coal at this plant, as compared with the cost at other plants under Woods' control, is found by reference to his further testimony as follows:

"Q. In the Consolidated Gas case you testified that labor handling would be .0075 per thousand cubic feet.

"A. Right.

"Q. And here you have it a dollar and a quarter?

"The Master:

"What was it in the Consolidated?

"Mr. Chambers—.0075.

"Mr. Ransom—That is a dollar and a quarter a ton.

"The Witness—A dollar and a quarter a ton.

"The Master—What is it carried out at?

"Mr. Chambers—That would be 3.13 cents.

"The Witness—Yes, as against three-quarters of a cent in the other case.

"Q. How do you explain that wide variance?

"A. Because in the case of the Consolidated Plant referred to, they were all on tide water where the coal was taken out.

"Q. But you didn't base this on any Consolidated plant?

"A. No, I said the Consolidated plants referred to were all on tide water where it was drawn right from the boat and put in the pile.

"Q. You testified in the Consolidated case that you didn't base that on any particular plant?

"A. No, I based it on a ten million plant; I said it ought to be on the water front—a plant of that size should be on the water front for economical operation.

"Q. And this is not, you say?

"A. No, this is not.

"Q. Well, how do you go to work to handle this coal?

"A. It has to be taken from the barge and put in automobile trucks and carted to the plant.

"Q. A distance of how far?

"A. Oh, I should say a half a mile.

"Q. That is the way it is handled here?

"A. That is the way it is handled.

"The Master—Isn't this Flushing plant on the water front?

"The Witness—No.

"The Master—A half a mile inland?

"The Witness—Well, I should say, probably—it isn't half a mile, from the water, but probably half a mile, I don't know the exact distance, from where they would bring it.

"Mr. Ransom—No place where there are any piers or bulkheads?

"The Witness—No.

"Mr. Neumann—Why not let the witness testify?

"Q. Isn't it on any navigable water?

"A. The amount of money involved, however, in the transportation would not justify the abandonment of the plant for the purpose of putting it on the water; the amount ex-

pended for the purpose of putting it on the waterfront would not justify in changing from the present location of the plant.

"Q. Well, it is a badly located plant, is it?"

"A. It may have been badly located but it is there.

"Q. What did you figure on labor, how much?"

"A. A dollar twenty-five a ton.

"Q. How many men?

"A. That was the contract price they got; I didn't take into consideration the number of men.

"Q. Isn't it on a railroad, this Flushing plant?"

"A. There is a railroad, but there is no railroad siding to the plant.

"Q. But one could be built?

"A. Yes, and probably will be.

"Mr. Ransom—It is not on the railroad, the testimony in the case shows.

"The Witness—I say it is not on the railroad but by the purchase of some land a siding could be put in.

"Q. How far is it from the railroad?

"A. Five or six hundred feet, I should say, —is that right, Mr. Spear?

"Mr. Spear—About 200 feet.

"Q. Then if you had a little siding 200 feet, you would be rid of that transportation or some of it?

"A. With the expense involved in doing that, putting it in?

"Q. Supposing the railroad would put the siding in?

"Mr. Ransom—Objected to. The company has indicated that they were going to do that when it could acquire the land. We have not yet proved the situation in that respect; the company could not do it until it acquired the land.

"Mr. Neumann—You just stuck your head in the door, didn't you?

"The Witness—They didn't go any further with it.

"The Master—Objection overruled.

"Q. Then you took that figure of coal-handling from the records of the company?

"A. That is right.

"Q. And that is not your idea about it?

"A. Well, it is my idea because I knew that they were paying for doing that work. I think, under the conditions, it could not be done for any less.

"How much was that a year ago, say, or two years ago, that cost?

"A. I don't know. I can recall some three or four or five years ago, I think it was fifty cents.

"Q. In place of what, a dollar and a quarter?

"A. That is just an illustration, Mr. Chambers, of how things have gone up all along the line.

"Q. Well, things are abnormal. That proves it, doesn't it?

"A. Well, it is a question of what may be considered abnormal. It looks now as if we had normal conditions, unless it goes higher."

(R. 431-433 [482-485].)

It is no answer to our criticism concerning the location of this plant for Engineer Woods to say that it is there and that respondent must make the best of a bad bargain. To our mind, this continuance of excessive cost for handling coal for over fifty years, condemns the management. The record shows there is a railroad within 200 feet of the plant, and a railroad siding should certainly have been put in some years ago to bring down the cost of handling coal from \$1.75 per ton to not over 50

cents per ton. Does not this lack of intelligent effort indicate that in the past this company has been able to earn ample returns under the very worst kind of management. It may well be presumed that the executives did not feel there was any need worry about profits. They were content with what they got and made no effort to get more by cutting down expenses.

In addition to the fact of this unnecessary expense in handling coal, it will be noted by the Court that respondent has submitted no proof that it actually receives all of the coal for which it pays:

"By the Master:

"Q. About how many barges of coal do you have in a year?

"A. Of broken coal, about an average, pretty nearly, of a cargo a month, five or six hundred tons; and on boiler coal probably one every two months.

"Q. When it comes on the barge alongside of Flushing Creek is it weighed there at all or is it weighed when it gets to the plant?

"A. No, it is not weighed; we take the bill of lading weight.

"Q. You always take the bill of lading weight?

"A. We have to pay on the bill of lading weight.

"Q. Do you not in any way check up your quantities?

"A. Well, we check up the quantities by periodical inventory, periodical measuring of the coal pile.

"Q. You do not check up the quantity in the barge for which you are charged?

"A. No.

"Q. Who receives the coal from the barge?

"A. The superintendent of the works.

"Q. Personally?

"A. Yes.

"Q. So he can tell us just how many barges of coal he got during the year—he would know?"

"A. Oh, yes."

(R. 182 [58].)

The Court will no doubt bear in mind, after reading the testimony in this case, that there are many possibilities of coal being diverted from respondent's use. For instance, the coal is loaded at the mines on the railroad cars, and a bill of lading is issued showing the weight of coal so loaded. That is what respondent pays for. The coal on the railroad cars, however, is dumped into barges at tidewater. There is no evidence and no assurance that all of the coal is dumped out of the said railroad trucks, and this is really an important point to take into consideration in winter weather when it is obvious that moist coal may stick in the pockets of the car, due to frost.

In addition to this probable source of loss to the respondent, there is the further likelihood that coal may be stolen from railroad trucks *en route*, particularly in the yards where quantities of coal are stored before sufficient trucks are available to make a barge load of 600 tons.

We next may consider the probability that, in unloading from railroad trucks into barges some spillage occurs. Furthermore, these barges are transferred to the public dock by steam tugs. It is surely quite likely that if fuel for raising steam was short, or of poor quality, the tug engineer might borrow some of the high grade anthracite generator coal or bituminous boiler coal while he is transporting it across the bay to Flushing Creek.

The possibilities of loss are not yet exhausted.

The coal on the barges is unloaded into automobile trucks or horse drawn wagons and delivered along public highways. It being evident that it is very difficult to clean out the pockets in a barge and, the work being done by contract, one can well imagine the great temptation there is for the contractor to get out the bulk of the coal which is easily handled and refuse to bother with the coal in the corners of the barge pockets.

Still another possibility occurs for loss of coal. It would be only human on the part of the hauling contractor to load his trucks to the limit because idle time of the truck, or the required travel of over a half mile distance with only a part load, would mean additional expense per ton-mile. A full truck passing over uneven dock structures and roads causes much spillage. This is particularly true where there is a detour, as in this case. Any intelligent layman must have observed, in passing coal docks or railroad freight yards, that some people make a regular business of gathering up the spillage of coal.

We point to the fact that respondent relies upon pure assumption as to the amount of coal received. It has not proved that it receives all of the coal it pays for. *What it does pay for is the coal loaded on the railroad trucks, hundreds of miles from the plant. Furthermore, the trip by water from the lighterage limits of New York Harbor to Flushing Creek dock, which serves the plant of respondent, takes about five hours (R. 182).*

The system used by respondent in accounting for the coal that it professes to use for generator fuel in the production of gas, condemns the plan of reporting its operations.

Mr. Morrison, as Superintendent of the Flushing Works, in direct personal charge of the operation of the works and the manufacture of gas, devotes

his entire time to that business. (R. 571 [801].)

We have shown that respondent pays for the coal on the basis of railroad company's bill of lading weights.

The following questions were put to the witness Morrison :

"The Master—Do you weigh the coal when it comes in?

"The Witness—No.

"Q. That is, you make a check of the coal pile monthly by measurement?

"A. I do.

"Q. So that if there were any considerable discrepancies between the amount of coal billed and the amount of coal received, your inventory would show it?

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial. That is a conclusion for the Master to draw from the witness' testimony, not for the witness to testify to.

"The Master—Overruled.

"Mr. Neumann—Exception.

"Mr. Tobin—Exception.

"A. Yes.

"By the Master:

"Q. You said something about keeping track of the coal used, did you not?

"A. Yes.

"Q. How do you do that?

"A. We keep an account of the number of buggies as they are dumped into the machine, and the gasmaker puts it on his sheet, and we add those buggies up each day and compute the weight of coal from those buggies.

"Q. How much does a buggy contain?

"A. From eleven to thirteen hundred pounds.

"Q. Do your buggies vary in size?

2
3

"A. No, they are all the same size.

"Q. Do you weigh each buggy?

"A. No.

"Q. How do you say from eleven to thirteen hundred pounds?

"A. We have weighed them to check up on the weights.

"Q. How do you figure them, 11 or 13?

"A. We use 13.

"Q. You use 13 as the quantity that goes into the manufacture?

"A. Yes.

"Q. Why do you do that when some of it runs as low as 11?

"A. Using it in that way and checking up with our inventory at the end of the month, our coal pile comes out nearer to what we have used, using 1,300 pounds to the buggy.

"Mr. Neumann—I move to strike that out, as to how much he used, as a pure guess, based on his conception.

"The Master—Overruled.

"Mr. Neumann—Exception.

"Mr. Tobin—Exception.

"By Mr. Ransom—Do you personally watch the filling of the buggies?

"A. Yes." (R. 572-3 [804]).

It is to be noted that none of the three gasmakers was called to prove the entries on the daily work's report sheet.

In connection with the above testimony, we will endeavor to show that it is impossible for the witness to do what he claims he does in the matter of measuring the coal pile periodically, watching the buggies that go to the generator charging floor and keeping track of the coal used, even though he claims he is on the job twenty-four hours in the day (R. 571 [801]). The witness testified that it takes about thirty buggies daily to handle coal

from the pile to the generator floor (R. 577 [812]). He also testified :

"Q. Did I also understand you to have said that you personally watch the filling of those buggies?

"A. At times, yes.

"Q. Is that part of your task, or your job at this plant, to watch these buggies as they are filled?

"A. It is part of my work, yes.

"Q. How much time would it take to fill a buggy?

"A. One man about fifteen minutes.

"Q. And you would be right there present when they were being filled?

"A. Not the entire time, I might not, but I see the buggies as they go on the elevator and on the generator floor?

"Q. All the buggies?

"A. No, not all.

"Q. Well, how many of them?

"A. Well, I might observe a dozen a day.

"Q. So you do not really know whether they contain 1300 pounds of coal, or 1200 pounds of coal or 1000 pounds of coal?

"A. I would know that by the amount of coal that is on the buggy from previous weights that I have taken.

"Q. It would simply be mere guesswork, would it not?

"A. It would—a pretty good guess, though.

"Mr. Tobin—I ask that the last part of the answer be stricken out.

"The Master—Motion denied.

"Mr. Tobin—Exception."

(R. 594 [840].)

Just before this point in the record, the witness testified that there is no check on the coal used until it goes into the manufacture of gas, other

than the monthly periodical measurement of the coal piles, which he makes personally. *In passing, it may be noted that he takes the measurement of the stock pile and makes a memorandum, but there is no way of checking these memoranda, because they are not preserved.*

We direct the Court's attention to the testimony of the witness Morrison that there is a shortage of men and the company cannot get all the men that it needs. (R. 600 [849].) This must mean that Morrison is kept extremely busy and it is therefore fair to conclude that he cannot possibly check up these buggies to see that they are properly filled, particularly as the shortage of men has been so great that he, Morrison, according to the testimony of General Manager Spear, has been forced at times to go on the operating floor and make gas himself.

The witness, Spear, tried to bolster up the weak testimony of Morrison by stating that he also looked at the buggies containing the coal as they go from the coal pile to the generator floor. (R. 637 [911].)

Mr. Spear only spends a short time at the plant on some not particularly specified mornings throughout the year, so it is quite evident he cannot have any personal knowledge that all the buggies containing coal are properly filled. His testimony regarding the checking up of the coal is as follows:

"Q. Taking up the coal, how do you follow that through, how do you take care of that as far as protecting the company in getting the full quantity of coal that is billed to you is concerned?"

"A. Only by the measurement of the piles which is taken periodically."

"Q. There is no account taken of it as it is

unloaded from the barges to the wagons or carts which draw it from the barges to your coal piles?

"A. No.

"Q. You take no account at all until it reaches the coal pile?

"A. That is right.

"Q. And then you follow it through in the measuring of the coal as it goes into the manufacture of gas, that is, you take another measurement then?

"A. We measure it periodically, usually about the first part of the month.

"Q. I mean these buggies?

"A. I don't pay any attention to the buggies except occasionally as I go to the generator house and look to see if they are filled to about a certain point, to see how they are running.

"Q. Your account then, of quantity is taken in these periodical measurements as against the amounts that are received for bills rendered? A. Yes.

(R. 637 [911].)

Incidentally, we may say, the testimony of the witness Spear as to the average amount of coal contained in the buggies, or in fact on any matter of quantities relating to materials used, is very unsatisfactory, because he does not even know what is meant by a weighted average, as is shown by the following testimony:

"Q. (Interrupting) Do you know what a weighted average is?

"A. A weighted average?

"Q. Yes.

"A. No.

"Q. You take merchandise that you have purchased over a number of years, in order to get a weighted average, you must know how much you purchased in each year, that is correct isn't it?

"A. Yes.

"Q. Do you recall now what a weighted average is?

"A. Well, I have never used it.

"Q. You did not use it in this exhibit?

"A. Oh, no, we took the high and low price that we paid for these materials in those respective years.

"Q. And that is true of every item, is it?

"A. Yes.

"Q. And you have arrived at these figures of percentage here not according to what is called weighted average, but a straight average?

"A. A straight average, yes.

"Q. Irrespective of the quantity?

"A. Yes.

(R. 707 [1031].)

How does respondent attempt to prove that its operations are reasonable? It offers opinion testimony by an engineer in its employ who, in the bulk of his operations has to do with plants of enormous size, both coal gas and water gas, totally unlike that used by respondent both in design and capacity. Woods' chief concern is with a coal gas and water gas plant that has a capacity of not less than 80 million cubic feet per day.

The testimony of Woods shows that he based his estimate of fair operating cost upon a hypothetical plant. He did not even go to the trouble of examining the record of operations which respondent keeps (R. 178 [562]), although he did admit, (R. 432 [181]) that he took the cost of handling coal from the records of the company. It is further shown by the following that Woods did not base his estimate of cost for producing gas on any records of the company.

"Q. Did you base that on any records of the company?

"A. I know the number of men required to operate a plant of that kind? For instance you have a gasmaker who makes a million feet a day, in three shifts they would make a million feet for each of three machines, and in a larger plant, where they had larger machines, in a plant capable of handling larger machines that same gasmaker would make three million, so for the gasmaker himself it would be three times as much as in the large plant where they have these large individual units. You could not afford to put up individual units of that kind in a plant like Flushing, you would have to rebuild the plant entirely in order to handle the proposition.

(R. 412 [500].)

In reference to Woods' claim that it costs a certain amount, per thousand cubic feet, in making a million cubic feet of gas per day, it will be noted from his testimony that he figures a fixed number of men at certain rates of pay, and then divides the result in dollars by one thousand M cubic feet of gas made. The testimony shows that the plant he figured on would make much more than one million feet a day.

"Q. This company out there does not make a million cubic feet a day?

"A. They do.

"Q. They make a good deal more than that?

"A. They will make slightly more than that; they average that.

"Q. Didn't you hear testimony the other day that it was 1,600,000?

"A. That is a maximum capacity. They probably gave you a send-out of 1,600,000? I do not recall the exact figures, but I think their annual send-out was around 375 to 380 million cubic feet make, which would be close to an average make of one million a day. A mil-

lion a day would be 365 million. Their average make was probably 1,050,000 a day.

"Q. They make sometimes 1,600,000?

"A. Yes.

"Q. Wouldn't that cut the cost down?

"A. Yes, and if they made less than a million it would probably bring it up.

"Q. Do they make less than a million that you know of?

"A. There are times when it must be less than a million to get an average throughout the year of slightly more than a million.

"Q. Then they could close down one of the machines and relieve some of these gas-makers and others.

"A. I took it as a condition of operating a million a day. At times their cost may be a little more, and at times a little bit less than that."

(R. 446 [507].)

The claim we make is that, while the average make per day for 365 days in the year may be slightly over a million cubic feet, this does not indicate that the plant sometimes runs a little higher, and sometimes a little lower, from day to day. The evidence is to the effect that this plant has a seasonal load, so that when the make from day to day runs, *for consecutive months*, over 1,500,000 per day, the cost per M should be a good deal less than on a plant which is running on an average close to a million cubic feet per day throughout the year. The evidence shows this plant has three sets of generating apparatus. When the production gets down below one million cubic feet a day, it is not necessary to keep Woods' whole gang of men on. Respondent would operate only one machine, and, therefore, the amount of money into which the quantity of gas would be divided would be very much less than it would be

if respondent had to operate two machines all the year round, making an average of a million cubic feet per day.

The strange feature of Wood's testimony is that he sets up a hypothetical plant, with an imaginary force of men to operate it, notwithstanding the fact that he frequently visits the plant in the capacity of consulting engineer, and could keep an accurate record of the number of men actually employed. His testimony regarding the number of men who *might* operate the plant is as follows:

"Q. That is, have they a superintendent, one clerk, three gasmakers, three engineers, two boiler firemen, two generator firemen and coal passers, and two laborers?

"A. I would say so, yes.

"Q. Are you sure about that?

"A. I am quite sure that they have that many men.

"Q. You don't know what they pay them over there, do you?

"A. I do.

"Q. Those prices?

"A. Those are the average rates. The gasmakers and engineers are not all paid the same rate. The average rate for those different classes is there.

"Q. The superintendent, do you know what he gets over there? A. I do.

"Q. Those prices?

"A. Those are the average rates. The gasmakers and engineers are not all paid the same rate. The average rate for those different classes is there.

"Q. The superintendent, do you know what he gets over there?

"A. I do.

"Q. What does he get?

"A. \$2,100 a year, I believe.

"Q. And his maintenance, his house there?

"A. His house.

"Q. Does he pay rent for that?

"A. No, he doesn't pay any rent that I know of.

"Q. Now, the clerk?

"A. The clerk I have there at \$1 a day. Just what they are paying the clerk I don't know. I don't believe they are paying quite that, because they have a new clerk they just put on, and he probably is not getting \$1. \$1 is what they will have to pay as soon as he is broken in.

"Q. What are the gas makers getting over there?

"A. The average rate is indicated on that exhibit.

"Q. Then they have got three over there?

"A. Yes.

"Q. And three engineers?

"A. Right.

"Q. At these prices?

"A. Right.

"Q. That is, some of them are getting less, I take it, and some more?

"A. Yes, for all three that would be the rate."

(R. 117-8 [509].)

Looking at the above testimony, it will be seen that Woods allowed for a clerk to be employed all the time, whereas the testimony of Mr. Morrison is that very frequently he does not have any clerk.

(R. 574 [806].)

While this point is fresh in the Court's mind, about there being no clerk, and also bearing in mind that Mr. Morrison occasionally has to make gas himself as an operator of a machine, it would seem all the more unreasonable to believe that he knows the buggies of coal going to the generator floor are properly loaded to carry 1,200 pounds of coal each.

Mr. Woods' testimony regarding the cost of oper-

ating a hypothetical plant was shown to be very much different from his testimony in the Consolidated Gas Company case, to which frequent reference was made in the present record. One cannot get his viewpoint that in the Consolidated case he testified to the estimated cost of a hypothetical plant of 10 million cubic feet capacity, which operates almost to capacity every day. It surely must be evident that in a plant making 10 million cubic feet on an average, the spread between the daily minimum make and the maximum daily make must be at least as great as in another hypothetical plant where the average daily make is one million cubic feet. How then can his claim be given any weight that the marked difference in his hypothetical cost in the 10-million plant is explained by a greater amount of idle time in the smaller plant. Woods claims that the cost is much higher in a million foot plant than in a 10-million plant, but that it would be no lower in a 20-million foot plant.

"Q. Well, what did you testify to in that regard?

"A. I testified that in a plant such as I testified to in October, 1919, as bearing upon the Consolidated Gas Company's system, which did not include the Flushing Company in any sense, that a fair operating condition was 2½ cents per thousand cubic feet for gas-making labor.

"Q. If you had a plant of 20 million cubic feet capacity, could you operate it for less than these figures that you have in October, 1919?

"A. I could not.

"Q. There would be no decrease?

"A. No.

"Q. How about the other way, the converse?

"A. If you can operate a plant continuously anywhere from five to ten million—if you recall, Mr. Chambers, in my testimony, I testi-

fied to a plant on an average condition operating on ten million feet a day, and that plant would run anywhere from $7\frac{1}{2}$ to 15 or 18 million. I took a fair operating condition throughout the year. At times the gas-making labor would be somewhat less than $2\frac{1}{2}$ cents, and at other times it would be somewhat more than $2\frac{1}{2}$ cents, but I believe under the conditions under which we were operating, a fair amount was $2\frac{1}{2}$ cents per thousand cubic feet."

(R. 145-6 [506].)

In the instant case he testified that the cost ought to be 6.71 cents per thousand cubic feet (R. 1597).

In further reference to the inefficiency displayed in the management of this company, attention is drawn to the testimony relating to the handling of coal from the stock pile at the plant to the water gas generators. We have already noted, from the testimony of Superintendent Morrison, that he had great difficulty in getting men to operate the plant, and it is apparent that respondent has a plant which requires more men than would be needed in a well-designed gas works. This is shown by the following testimony:

"Q. In a general way, will you describe these buggies?

"A. A large steel buggy on two wheels that has a funnel at the end. As they tip this buggy, it is dumped into the generator.

"Q. It runs on tracks?

"A. We run them, not on tracks but on channel irons, from the bin to the elevator.

"Q. What is the motive power?

"A. Man.

"Q. How many?

"A. Two. Two from the coal bin to the elevator, one after they get on the floor or where it is level pulling."

(R. 578 [813].)

The testimony of Morrison in reference to the way in which he keeps track of the coal used is so confused that we doubt if anyone can make sense of it. Beginning at page 572 of the Record, it will be noted that Morrison testified that each buggy can contain from 1,100 to 1,300 pounds. They do not weigh each buggy load. He uses 1,300 pounds rather than 1,100 when he puts the amount down on the works reports' sheets. He was asked why he put down 1,300 pounds when some of the buggies ran as low as 1,100 pounds, and his answer was:

"Using it in that way and checking up with our inventory at the end of the month, our coal pile comes out nearer to what we have used using 1,300 pounds to the buggy."

(R. 573 [801].)

It was evident that the Master was quite confused by Mr. Morrison's testimony regarding the keeping of records of coal used, as is shown by the following:

"By the Master:

"Q. Let me ask you this, Mr. Morrison. You say that you take these buggy quantities at 1,300 pounds, then you check it up with your inventory at the end of the month. What quantity of coal used do you report at the end of the month, the amount shown as the result of your inventories or the amount of the computation of the buggies?

"A. The computation of the buggies.

"Q. Suppose that is less than the amount shown by your inventory check, do you still stick to your buggies?

"A. No, we change the weight of the buggies to meet that.

"Q. Suppose it is more than indicated for your inventory check?

"A. Then we would increase the weight of the buggies.

"Q. Then you take the result of your inventory check rather than your 1,300 pounds per buggy, don't you, as the total used in the course of a month?

"A. In that way, yes.

"Q. What?

"A. In that way, yes.

"Q. What?

"A. In that way, yes.

"Q. In what way, don't you? What I am trying to get at is this, Mr. Morrison. You use a certain quantity of coal in the course of a month, do you not?

"A. Yes.

"Q. How do you determine that?

"A. By the number of buggies and by the weight per buggy.

"Q. Suppose the number of buggies in the course of a month indicates that you have used 500 tons?

"A. Yes.

"Q. When you check it back with your inventory you found you only used 400 tons?

"A. Well, that never happens; we are very much closer than that.

"Q. What?

"A. We are within ten tons of our inventory.

"Q. Always?

"A. Most always.

"Q. Then you would stand by your buggies' weights?

"A. We would stand by our buggy weights.

"Q. And you disregard the variance of the ten tons?

"A. Yes, take the standard weight of the buggy against the tape measurement of the coal pile.

"Q. Then you rely on your buggy weights of 1,300 pounds?

"A. Yes."

(R. 575-6 [809].)

We confess that we are still confused as to what respondent actually does in regard to the amount of coal used, notwithstanding we have made a very close perusal of the entire record in respect to the amount of coal reported used. Furthermore, we cannot point to any place in this record where respondent showed that the computations made of the amount of coal used are in any way checked against the amount of coal paid on bill of lading weights.

In his report the Master makes no reference to errors that admittedly took place in reporting the amount of coal used, although the record shows that during the trial he was amazed at some of the errors which crept in. This is shown by the following testimony:

"The Master—Yes, I am going to sustain the objection in a minute. I just want to let Mr. Neumann develop his theory here. Is that in error?

"The Witness—That is an error.

"The Master—An error of how much?

"The Witness—200,000 pounds.

"The Master—How could that error get by to such an extent? Let's understand something about it? How does a big error like that creep in?

"The Witness—Due to the labor conditions and other troubles up at the plant. I did not check these underlying figures here but checked the summaries and took the clerk's figures here.

"The Master—Well, 200,000 pounds makes a good deal of difference in the cost.

"The Witness—It does, yes, but we catch that on the measurement of the coal pile.

"The Master—Well, how could it? It shows up there, does it? Does the error show on there?

"The Witness—No, the error does not show here, but the error is gradually taken up, so that it is taken care of as we go on.

"Mr. Ransom—What month was that?

"Mr. Neumann—I move to strike out that last answer as a mere conclusion.

"The Master—Yes, I will grant that motion.

"Mr. Ransom—Exception."

(R. 588-9 [830].)

In comparison with the testimony of Woods regarding the number of men to be used in his hypothetical plant, there is the evidence of General Manager Spear. Woods testified that three gas makers would be needed, whereas Spear showed this was not the fact:

"Q. And how many gas makers?

"A. Three.

"Q. Is that the average, three, or is that the extreme number employed?

"A. Three would be the extreme number, except that we have an extra man broken in in case of sickness of one of the gas makers that could take his place, but we only use the three where we are running three shifts.

"Q. Taking the twelve months, for many months, would you employ three gas makers during the year 1919?

"A. I can't tell that without looking over the records.

"Q. Would you employ two gas makers for most of the year?

"A. That is pretty hard to say. I say possibly two and a half for the year 1919, it might average that.

"Q. It would average about two and a half?

"A. It might; I can't tell except from the records.

"Q. That would be your judgment?

"A. I would not want to say positively on that without a study of it."

(R. 641 [918].)

In Woods' computations concerning cost of producing gas at a hypothetical plant, he inflated the figures by assuming the generator coal was of bad quality. Instead of testifying that 32.5 pounds would make a thousand cubic feet, he insisted that 34 pounds was required.

We draw the attention of the Court to some testimony which shows the unreliability of the opinion evidence of Engineer Woods:

"Q. Has the coal during recent years often-times been of inferior grade?

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial, and not the proper way of proving it.

"The Master—Objection overruled.

"Mr. Neumann—Exception.

"Mr. Chambers—The witness has not any knowledge on the subject.

"The Master—I am going to find out.

"By the Master:

"Q. Have you kept in touch with the quality of coal delivered at Flushing?

"A. Yes, I have, your Honor.

"Q. To what extent?

"A. Why, we have an analysis of their cargoes and a knowledge of the results from the operations of their various cargoes.

"Q. You are watching that all the time, are you?

"A. All the while. I get reports from Flushing the same as I do from the other companies.

"Mr. Ransom-- And some parts of their coal at least are taken to Flushing from the Astoria?

"Mr. Neumann-- That is objected to on the ground it is incompetent, irrelevant and immaterial, and not the proper way of proving it, not by what this witness—

"Q. Do you know?"

"A. Yes,

"Q. Have you seen it?

"A. We have shipped them coal.

"Q. Have you seen that done?

"A. I have.

"Mr. Neumann-- Exception."

(R. 112-13 [151].)

Woods also testified to the quality of coal on his cross-examination, as follows:

"A. No, I would not necessarily. It might be possible, Mr. Chambers, that they could get three or four cargoes of coal, and it would be an unfortunate thing, but if they were all bad that generator fuel would run 37 or 38 pounds, and you could not help yourself.

"Q. That would only be an isolated incident, would it not?

"A. It would be an incident. It is an incident we have at times, where they will get a cargo of coal and immediately the results go off, that they cannot control them or rectify them; they cannot get back to a good operating condition.

"Q. You took that into consideration when you testified in the Consolidated case?

"A. I did, and, as I stated here, while we have those conditions and we have a bad fuel condition, that with the coal that we receive and the coal that we have on hand, the quantities that we are able to use, we are able to use some of our good coal with our bad coal and

try to obviate those conditions, which cannot apply in a case like this."

(R. 454 (520).)

Woods' opinion testimony was not supported by the evidence of another employee of the Consolidated Gas Company, Walter R. Addicks, Vice-President, who purchases coal for respondent:

"Q. You stated this morning that where it was found by Mr. Spear that the coal was not up to the requirements, that is, was not of the quality good for making gas, that he reported to you. Can you tell the Master what procedure you followed, that is, what you did about that when Mr. Spear reported to you that the coal was not proper gas-making coal, was not sufficient in the qualities necessary for making gas—what did you do then?

"A. I would ordinarily take it up with the coal companies, they would send an inspector down—

"Q. Tell us exactly what you did do?

"A. I would have an analysis of every cargo of coal that is used—

"Q. Who makes that analysis?

"A. The chemists. If we found that the coal was not well prepared we would take it up with the coal company and ask them to inspect it. They might say our sample was not good, and might take other samples, and we would object and they would say the coal was not made by them, they gave us the best they could, etc. Anthracite coal has been running fairly well. Bituminous we had some trouble with.

"Q. What rebate has been allowed to the Consolidated Gas Company because of the failure of the coal company to furnish the quality of coal which was called for in the contract?

"A. I don't remember any rebate.

"Q. That is, you cannot recall any moneys

being paid back to the Consolidated Gas Company?

"A. Not one cent.

"Q. For poor coal, at least coal that was not sufficient in quality?

"A. No.

"Q. Well, taking the New York & Queens Gas Company, can you tell us of any rebates that were paid back to the Consolidated Gas Company for the benefit of the New York & Queens Gas Company because of the failure of the coal companies to deliver coal of a proper quality?

"A. I cannot. I don't remember any complaints from Mr. Spear about the quality of the coal. I did not take up any question of the quality of his coal.

"Q. You indicated that Mr. Spear at different times had complained?

"A. No. I said that would be the procedure if the coal had not been up to the standard, but I don't remember any complaint.

"Q. Then I misunderstood you. I understood you to say he had complained?

"A. No. I don't remember that he ever did.

"Q. So your testimony is that you don't remember Mr. Spear complaining at any time?

"A. As to anthracite I do not.

"Q. How long a period of time would you say that would cover?

"A. Five or six or seven years.

"Q. And no rebates have been paid back for poor coal?

"A. Absolutely not.

"Q. Have any adjustments or allowances been made at all for the benefit of the New York & Queens Gas Company covering the period of 1919, 1918?

"A. None.

"Q. None whatever?

"A. No.

"Q. So that the price fixed in the contract

is the price that the New York & Queens was called upon to pay?

"A. It is.

"Q. And there has been no change whatsoever as to those terms?

"A. Absolutely none.

"Mr. Tobin—I don't like to prolong this testimony, but Mr. Gawtry indicated that there was the possibility of protesting, and of protests being made because of poor quality. If it was of no avail then there would be no purpose of making the protest.

"Q. Has the Consolidated Gas Company on behalf of any of its companies, or on behalf of its own company, gained anything by those protests?

"A. Merely demanding and asking for better preparation of the coal. We have frequently done that in my experience.

"The Master—Does that avail you very much?

"The Witness—Not very much, excepting asking for better quality.

"The Master—Do they do any better?

"The Witness—I think they do. We test every single cargo of coal that comes to us. Most people put it in their boilers and let it go. We tear apart those ingredients on every ton of coal, and we are very particular. I think because the coal companies know we are particular we get better coal and better service.

"The Master—But you don't get any rebates?

"The Witness—No. Coal is not made to order. Coal comes from the ground ready made.

"Q. Has it not at any time been so poor in quality that you deemed it advisable to turn to some other coal company to purchase coal?

"A. Not with anthracite. I have with bituminous, but not with anthracite.

"Q. You only buy anthracite coal?

"A. That is practically all the Queens Company uses. I have bought large quantities of bituminous coal for the Consolidated Company.

"Q. So there was no complaint sufficient at any time to make it necessary for you to turn to some other companies to buy anthracite coal?

"A. No."

(R. 551, 552, 553 [686, 687, 688].)

We will next refer to the testimony of Maynard H. Spear, General Manager of respondent. He was asked concerning the quality of the coal and testified as follows:

"Q. Now, as to the quality of coal, do you make any complaint if the quality of coal does not meet the necessary requirement, or what your gas maker says it should be?

"A. Yes.

"Q. How often would it happen in the course of a year that the quality of coal would be deficient?

"A. Oh, it is very rare.

"Q. Very rare?

"A. Yes. Coal will vary, but we very seldom make a complaint on the quality of coal.

"Q. Did you find in the year 1919 that the quality of coal was more or less deficient, and that you had to make up that deficiency by something else to make up the manufacture of gas?

"A. It had more dust in it than usual.

"Q. It had more dust than usual?

"A. Yes.

"The Master—Screenings?

"The Witness—Screenings."

(R. 638 [912].)

So far as Mr. Spear's testimony is concerned, the Master showed by his questions that the presence of more dust or screenings in the coal would not account for the use of more of this coal, as generator fuel, than is usually required. These screenings do not go into the generator but are in fact taken out for use as boiler fuel.

Spear also testified regarding coal, as follows:

"Q. Do you follow closely the quality of the coal supplied to the company?"

"A. Yes, I do.

"Q. From whom do you receive reports on which to base your complaints if any are made, whom do you receive reports from, the gas maker?

"A. No, from Mr. Morrison, or from looking over results, or from looking over the coal myself. From my experience in the gas business I can tell ——

"Q. You can tell whether it is proper quality or not?

"A. Yes.

"Q. Now, what would you say as to the quality of coal in 1918 as compared with the quality of coal in 1919, confining yourself entirely to the coal received by your company?

"A. Well, I cannot recall the comparison now between 1918 and 1919.

"Q. Can you say as between 1919 and the period of time that we have gone in 1920?

"A. No, I do not want to draw a comparison on that from memory now.

"Q. Would you say it was better in 1920 than it was in 1919?

"A. That would be pretty hard for me to say from memory; I would not want to do it.

"Q. Would you say it was about the same in 1920 as it was in 1919?

"A. I would not want to make a statement on that.

"Q. That is, you do not care to make a statement?"

"A. Well, I cannot recall it from memory."

(R. 639 [911].)

As compared with Mr. Woods, of the Consolidated Gas Company, who testified that more coal is needed because the quality is poor, it is interesting to note that respondent called Martin Morrison (R. 569 [798]), the superintendent of the plant, who testified that when a cargo of coal arrives he generally goes down to look it over:

"A. (Continued.) I am present when the coal is hauled into the plant. We pay for the coal on the railroad's bill of lading. When the coal has been delivered I notify Mr. Spear of its receipt by signing my name on the back of the invoice."

(R. 571 [802].)

Mr. Morrison, who knew, if anybody did, what quality of coal he received and used at this plant, was not asked a single question by counsel for respondent regarding the quality of the coal received.

The saving of 1.5 pounds of coal per 1,000 cubic feet of gas made is equivalent, on Woods' basis, to about .63 cents per M cubic feet of gas sold. Add this to the \$9,500 saved on handling the coal, equal to about 2.8 cents, and we have available for return to the investors, from this source alone, nearly $3\frac{1}{2}$ cents per thousand cubic feet of gas sold.

A cent per thousand here and there will make a great difference in this case. Take for instance the Master's finding (No. 48, R. 44) where it is noted that he believes respondent failed to make the revenue meet the expenses, in 1919, by \$9,074.70. Here we have, by challenging just the one item of

generator fuel, thus reducing the expense about 3½ cents per M cubic feet, more than wiped out the deficit. If we take the book figures for generator fuel, our correction of the reported cost would be still greater, because the respondent alleges it used 31.59 pounds per M feet, as against the 34 that Woods used and the 32.5 pounds that we claim should be the maximum allowance.

It is worthy of note that the Master sets up the book costs in arriving at his conclusions, and he seems to rely upon Woods' hypothetical figures to substantiate them. Woods, however, demonstrated that several items of cost are unreasonable, and we cite as one instance the reported expense for boiler fuel. Teele's exhibit (Complainant's No. 64, R. 1569) shows an expense of \$0.0882 for this fuel whereas Woods said \$0.0639 is ample. The difference in favor of appellants on account of reducing this excess cost is equal to almost \$0.028 per M cubic feet of gas *sold*, figuring the unaccounted-for gas at 12 per cent. The Master erred in not finding that the evidence of respondent's witness Woods conclusively shows the boiler fuel is excessive to the extent of at least 2½ cents per M cubic feet of gas sold. On a spread of 336,241.4 M cubic feet of gas sold, this saving alone would have given respondent an additional net revenue of \$9,246.64.

There is another feature about Woods' evidence that we find difficult to follow. He assumes a cost of \$1.25 per ton to handle coal. He then sets forth Boiler Coal as an item of expense and assumes a certain number of tons hauled into the plant. As a matter of fact, respondent uses its own water gas tar for boiler fuel and, of course, that is pumped to the boilers and does not come by rail-

road cars, barge, automobile trucks or horse wagons. It is a byproduct of the gas and requires only a little steam to pump it to the boiler furnaces.

The Court will note from "Complainant's Exhibit 77" (R. 233), this being the estimate of cost to produce one million cubic feet of gas per day in a hypothetical plant, and from "Complainant's Exhibit 61" (R. 1569), which is Teele's tabulation of the reported cost of production for the year ended December 31, 1919, that the principal cost of producing gas is the expense for oil used to enrich the gas.

Woods claims that 1.2 gallons of oil are required to enrich each thousand feet of gas and that the purported cost per M. feet, under the price conditions assumed by him, is 30.59 cents.

In Teele's Exhibit the amount of oil reported used for the year ended December 31, 1919, is 4.19 gallons per thousand cubic feet of gas made and at the price purported paid for oil the expense for enriching each thousand cubic feet of gas made is 28.2 cents.

The testimony regarding the price paid for oil was offered by Mr. Addicks, Vice-President of the Consolidated Gas Company (R. 317 [284]). He is a member of the Executive Committee of said Consolidated Gas Company and familiarizes himself with all questions of new construction and expenditures, and is primarily responsible for contracts covering gas oil and coal. For a number of years he has had charge of the purchase of oil and coal for the Consolidated Gas Company. The company has made a practice of purchasing its gas oil on contracts extending over periods of time at a stipulated price. Addicks personally negotiates

agreements for the purchase of oil and submits the results of his negotiations for the approval of the Executive Committee of the Consolidated Gas Company. His purchase of oil for the Consolidated embraces also the oil requirements of certain Gas Companies affiliated with the Consolidated Gas Company, including the respondent.

Addicks negotiated the contract for gas oil required by the Consolidated and its affiliated companies, including the respondent, during the year 1919. The contract was placed with the Standard Oil Company of New Jersey.

Before the contract was signed Addicks asked for prices on oil from other refiners. He took into account whether or not the people that he asked to quote prices were in a position to supply the needs of the Consolidated Gas Company in the event that they were awarded a contract (R. 323 [291]). *This shows there is a question as to the advisability of tying in the comparatively small requirements of the respondent with the enormous needs of the Consolidated and its affiliated companies.*

In 1919, gas oil was scarce and the requirements of the group of gas companies controlled by the Consolidated Gas Company were so enormous that probably only one or two refiners could have fulfilled them.

As shown by "Complainant's Exhibit 71" (R. 1581), *an agreement for the deliveries of oil required in the year 1919 was made on the 18th day of December, 1918. There is nothing in the record to show that any attempt was made at an earlier date to purchase oil, when the market price was low, and store it in tanks for future use.*

Without exception, all contracts for gas oil are made by Mr. Addicks with the Standard Oil Com-

pany of New Jersey. The particular contract in question calls for the delivery of 122 million gallons of gas oil, for consumption in the business of the Consolidated Gas Company in its various plants in New York City or the plants of such other companies as it may designate in the said City or in Westchester County. The purchaser is given an option to cancel, on or before May 1, 1919, its obligation to purchase one-half of the quantity specified in the contract.

It appears from the record that Mr. Addicks is not an officer of the respondent (R. 337). He is a director. He admitted that in the contract (Exhibit 71) it is not stated how many gallons of oil is the proportionate share for the respondent, but he let the New York and Queens Company have all the oil it wanted. How much that amounted to he did not know, although he thought it might be somewhere between a million and a million and a half gallons, which is, of course, a comparatively small quantity out of the 122 million gallons contracted for.

The witness Addicks tried to show that he attempted to get prices for some oil in quantities sufficient to meet only the needs of the respondent, but the cross-examination shows that he did no such thing. The only thing approaching evidence to the effect that an attempt was made to secure some oil sufficient to meet the needs of the respondent is in the interpretation by counsel for respondent of certain form letters written by the witness Addicks to certain oil companies. Those refiners received such letters periodically, but were never given a contract for oil by Mr. Addicks:

"Q. Did you ever try to buy for them that quantity of oil from any company except the Standard Oil Company?"

"A. I tried to buy any quantity of oil from any company at that time.

"Q. No, I am asking you if you ever tried to buy that requirement of that company alone from any company, like the Texas Company or the Gulf Refining Company?

"Mr. Ransom—I object to that as immaterial and incompetent, unless limited to this period. 'Ever' is a long time.

"The Master—Yes, I think I will sustain the objection as to an indefinite period.

"Q. Well, at this time?

"A. I got a price within this period from the Texas Company.

"Q. For that number of gallons?

"A. For a million to a million and a half gallons per month for six months, with the privilege of renewal for another six months.

"Q. What was the price?

"A. Eight cents.

"Q. From the Texas Company?

"A. Yes, sir.

"Q. In writing?

"A. Yes, sir, in writing.

"Q. Where is the letter, have you got it?

"A. I have.

"The Master—When you said a million and a half gallons, did you mean a million and a half a month?

"A. No, a million and a half gallons a year.

"Q. What is this?

"A. A million to a million and a half per month for a six months' period.

"Q. I asked you if you tried to buy a million and a half gallons—not a million and a half gallons a month—but the requirements of this company, from any company?

"A. I think I did.

"Q. That letter you speak of is the letter you wrote for the entire Consolidated system, is it not?

"A. Yes, but it included——

"Q. No, I am asking you, did you ask any

company if they could furnish a million and a half gallons a year?

"A. I did not write any letter different from what I have already testified to in the other case, and a copy of that is here.

"Q. We don't want that. That is to say, you made no effort, did you, in 1918, to buy the oil requirements of this New York & Queens Gas Company separately from the rest?

"Mr. Ransom—I object to that as incompetent and contrary to the facts. The witness has testified that he asked for a bid for any quantity of oil, however small.

"Mr. Chambers—He didn't say so.

"A. The letter says that I would be glad to be informed if they have any gas oil from 28 to 30 Baume for sale and the price per gallon.

"Q. Don't read that, that is 1919. We are talking about 1918.

"Mr. Ransom—We are talking about 1919.

"Mr. Chambers—I am talking about 1918.

"Mr. Ransom—The objection was sustained to 1918.

"The Master—I understand the question to relate to the 1919 requirements.

"The Witness—That is what I am testifying to.

"Q. In that letter you say, 'For your information would say that the quantity involved would be in the vicinity of 122,000,000 gallons.'

"Mr. Ransom—The companies understood that they could submit bids for any quantity, however small, as shown by the fact that they did.

"Q. Mr. Addicks, I am going to ask you a plain, simple question. Did you try to buy oil for the New York & Queens Gas Company in the quantity needed by that company only, without including your system?

"A. I tried to buy oil for the New York & Queens Gas Company collectively with our other companies—

"Q. No, did you try to buy oil for that company alone without including it with the others?"

"The Master—Let us understand this. Mr. Addicks, Mr. Chambers intimates by his question that if you had tried to buy, as a separate proposition, a million and a half gallons of oil for the New York & Queens Gas Company that you could have done better than you did under the method that you pursued. He wants to know whether you made any effort to buy, as a separate proposition, a million and a half gallons of oil to cover the requirements of the New York & Queens Gas Company, and whether you made it clear to the people you were inquiring of that that was all you wanted?

"The Witness—I did not.

"Q. Do you know that the New York & Richmond Company was buying it for 5.75, from your own table in the 'Consolidated case'?

"A. I do know in the case of the New York & Richmond that they did buy for 5.75.

"Q. And the Brooklyn Unions—and the Bronx Gas & Electric were buying it—

"Mr. Ransom—When are you referring to?

"Mr. Chambers—1919.

"A. Yes, I inquired of that same company for oil and they said they were not able to furnish any.

"Q. What company was it, do you know?

"A. That was the Gulf Refining Company.

"Q. That was because you were asking for that large quantity?

"Mr. Ransom—On any part of it.

"Mr. Chambers—He said he didn't try to buy in this limited quantity.

"Q. Was it not known that you were in the market to buy 122,000,000 gallons of gas oil?

"A. They knew that was the maximum that I was in the market for.

"Q. When anybody said 'Addicks' they knew that it meant 122,000,000 gallons?

"A. They knew we bought in large quantities.

"Q. They knew that Mr. Addicks was not around trying to buy a million and a half gallons?

"A. I was not trying to buy a million and a half gallons only.

"In the Bronx Gas & Electric case, it was 7.55?

"A. Yes, 7.55.

"Q. And the Brooklyn Union 6.08?

"Mr. Ransom—Yes, back in 1918.

"Mr. Chambers—1919, according to your own exhibit.

"Q. 6.08, wasn't it, in March, 1919?

"A. 6.08, and we were buying as low as 6.28 in 1919.

"Q. Your contract is not as low as that that you put in evidence?

"A. Not for the first part of it.

"Q. That contract does not say six something, in 1919, it is over seven cents?

"A. Yes.

"Q. How do you explain this table here?

"Mr. Ransom—I object to the question. Contracts made at different times—

"Q. How do you explain the fact that this contract is over seven cents when you were actually paying six and something?

"A. At this time, but this 6.08 is the same date exactly as our 6.08, the same date, March 26, 1919.

"Q. Now, I can't understand how you can conform that with the price stated on the Exhibit 74.

"The Master—This Exhibit 74 is dated December 4, 1919.

"Mr. Ransom—But it covers the requirements for March, 1919.

"The Master—How can it when it is dated December 4, 1919?

"Mr. Chambers—That is the second exhibit. Where is the other one?

"The Master—Exhibit 73 was dated March 28, 1919.

"Mr. Chambers—I want the December, 1918, exhibit.

"Q. Where is your contract that covers March 28, 1919, Mr. Addicks? Is this it?

"A. March 28, 1919, is this contract.

"Q. What price was it?

"A. That was one and one-half cents less than the price that was involved on February 8, 1919, and that price, as a matter of fact—the New York & Queens Company, the first price was 7.7472, and at that date that I have just mentioned it became 7.7833, and then 1½ cents less than that figure which dated from April 1st. That is 6.2833.

"Mr. Ransom—For the New York & Queens?

"The Witness—For the New York & Queens.

"Mr. Ransom—The Consolidated would be somewhat less.

"Mr. Chambers—Just wait a minute.

"Mr. Ransom—No, I won't let even you mix up the case.

"Mr. Chambers—I ask that counsel keep from interrupting when I am cross-examining.

"Q. In other words, Mr. Addicks, gas oil dropped from December, 1918—it went down one and one-half cents when we get up to March, 1919?

"A. Yes, they gave us a reduction of 1½ cents a gallon as of that date. The contract for that year enabled us to cancel the contract as of the *first* of July on a certain number of days' notice.

"Mr. Ransom—That is why 1919 costs were so low.

"Mr. Chambers—I move to strike that out.

"Mr. Neumann—The Witness Ransom is again testifying.

"The Master—No, he is not, and therefore I will not strike it out.

(R. 338-312 [320-326].)

The testimony of Addicks in relation to his attitude towards the Standard Oil Company of New Jersey is very illuminating. Questions were put to him concerning the probability that cheaper grades of oil would be used by gas companies in the future, and his evidence shows that, no matter how conditions might change, the Standard Oil Company will always be the beneficiary of contracts let by the Consolidated Gas Company and its subsidiaries, of which respondent is one.

"Q. You can give me so much of the answer as I have stricken out, which said for the last two months it has been stationary. Mr. Addicks?

"A. I should say that quotations were within were similar within narrow limits; I will put it that way.

"Q. For the last sixty days?

"A. Yes, and not increasing as rapidly as during a period of six, four or five months ago.

"Q. How does that level of the last sixty days compare with the level of 1919, the high level of 1919?

"A. I should say that

"Mr. Chambers—I make the same objection.

"The Master—Overruled.

"Mr. Chambers—Exception.

"A. I should say the price of oil today was double what it was in 1919.

"Q. I get the impression from what you

have said that you do not expect it to go much higher?

"Mr. Chambers—I think that answer ought to be stricken out; it was not responsive.

"The Master—Yes, I am going to let it stand. I think it was.

Mr. Chambers—Exception.

"Q. What is your opinion or judgment as to the future price; do you think it is going further up, or will it remain stationary where it was for the last sixty days.

"Mr. Chambers—I object to that as incompetent, irrelevant and immaterial and speculative.

"The Master—All opinion evidence is speculative.

"Mr. Chambers—The witness is not competent to guess as to the future, and it is not a subject for opinion testimony.

"Mr. Hyatt—There is a very extraordinary thing about this testimony, your Honor, in my humble opinion, and that is that there is no foundation given. Inasmuch as there is no market price for oil, how can this witness determine whether there is an upward trend or downward trend, or what the situation is. It seems to me he is testifying, giving his opinion, on something that does not exist in the case and does not exist in fact anywhere.

"The Master—He knows more about it than I do, and I am going to get his opinion about it.

"Mr. Hyatt—It is just a dignified guess, that is the only way I can characterize it.

"Q. What is your dignified guess which I term an opinion, Mr. Addicks?

Mr. Chambers—Same objection.

"A. I think the tendency of the price of gas oil will be upward.

"Mr. Hyatt—Of course, that is objected to, your Honor.

"Q. Still up?

"A. Upward to a point where the gas companies will no longer purchase it for the manufacture of gas, and they will have to seek a source other than gas oil.

"Q. Seek a source other than what?

"A. Other than gas oil. In other words, a quality of oil, a lower grade of oil than has been used heretofore as a gas oil. In other words, it will require a lower B. T. U. standard in order to use some other quality of oil, and not make the candle power.

"Mr. Neumann—I move to strike it out, in reference to that part of it that states there is a lower grade of oil furnished.

"The Master—Yes, motion denied.

"Mr. Neumann—And also the part that the gas companies will have to use a different kind of oil.

"The Master—Motion denied.

"Mr. Neumann—Exception.

"Q. What makes you reach that conclusion; on what do you base that judgment?

"A. The great increase in the number of automobiles requiring more gasoline. The natural source of gasoline, that is the natural distillation of oil does not supply enough gasoline. The high pressure distillation method which has been introduced in the last four or five years takes up the gas oil, a certain portion of the process has taken up that source for gasoline, and the use of petroleum is going ahead faster than the production at the present time.

"Mr. Hyatt—I move to strike out the latter part of that, "and the use of petroleum is going ahead faster than the production at the present time."

"The Master—Motion denied.

"Mr. Hyatt—Exception.

"Mr. Chambers—I move to strike it all out as being Mr. Addicks' guess.

"The Master—Motion denied.

"Mr. Chambers—Exception.

"By Mr. Chambers:

"Q. Where are you going to get the lower grade oil?

"A. We will have to get the lower grade oil from the same sources that we have obtained the gas oil.

(R 370-1 [376-399].)

It is evident that the Standard Oil Company, which has always had the contracts for oil, will continue to get all of the business no matter what quality of oil is used for enriching the gas.

The Master was not impressed with the long term oil contracts made by other gas companies, which permitted them to get over the abnormal period without handing their profits to the Standard Oil Company.

By Mr. Chambers:

"Q. Mr. Addicks, when we left off last week, a week ago today, we were talking about oil purchased by the Boston Consolidated and the Public Service of New Jersey. You said you had not heard of those contracts at four cents, the five-year contract?

"A. You did not say anything about Boston, you mentioned—

"Q. You knew about the contract, didn't you, of the Public Service of New Jersey, and the Gulf Refining Company, whereby the Public Service purchased from the Gulf Refining Company 252,000,000 gallons of oil covering the period from August 1, 1911, to July 31, 1919, at a price which runs from 3.05 to 3.55.

"Mr. Ransom—I object to that as incompetent and not within the issues here, no proof of any such state of facts before this Court in this case. It is an effort on the part of the

Attorney General to interject and misrepresent facts as to which he is charged with knowledge.

"Mr. Chambers—How am I misrepresenting any facts?

"Mr. Ransom—You have not offered any proof of the contract.

"Mr. Chambers—I am asking him what he knows about oil. He is called here as an expert on oil.

"The Master—Objection overruled.

"Mr. Ransom—Exception.

"Did you, Mr. Addicks?

"I don't recall any figures except as you mention them. I do recall a figure of a certain contract which was not entirely fulfilled on the part of the Gulf Refining Company at somewhere in the vicinity of five cents, four to five cents.

"Didn't you hear the representative of the Gulf Refining Company testify at the last trial that that contract was lived up to?

"Mr. Ransom—I object to that as incompetent and not the proper method of proof. They cannot bind this complainant by asking this man on the stand whether he heard somebody else testify in another case to something which Mr. Chambers is willing, despite his oath as a member of the bar, to state.

"The Master—Objection overruled.

"Mr. Ransom—Exception.

"A. The contract was not fulfilled. I heard him state that. He said they considered it fulfilled, but it was not delivered under the contract, all the oil was not delivered. I think it was about twenty per cent, according to my memory.

"Q. That is your recollection of his testimony?

"My recollection is that he said that they considered the contract was fulfilled, and that

the United Gas Improvement so accepted it, but as a matter of fact they did not deliver within twenty per cent. of the oil that was contracted for.

"Q. That is your recollection of his testimony?

"A. That is my recollection of the testimony, not only of himself, but of the other witnesses.

"Q. Will you look at that and see if that is not just as I stated it (showing paper to witness)?

"Mr. Ransom—I object to it as incompetent and not the proper method of proof. No contract is produced. He cannot ask this man in this case something about a copy of a document which was in another case; and no foundation has been laid.

"The Master—I think counsel ought to stipulate that all contracts and exhibits in the case can be offered here without formal proof.

"Mr. Ransom—I am willing to stipulate that all the testimony in the other case on the subject of gas oil and gas oil contracts shall be put in evidence in this case. In the absence of such a stipulation I shall continue to object to what seems to me a very improper and objectionable method of attempted proof.

"The Master—Objection overruled.

"Mr. Ransom—Exception. He is asking him to construe a copy of something that he produced. The witness doesn't know anything about it. This document was not proved by the witness even in the other case. There is no proof as to the identity of this document which is shown to the witness.

"The Master—The witness having read that paper, Mr. Chambers, what is your inquiry?

"Mr. Chambers—I am asking if that is not as I represented it to be in the question, as to the quantity and price.

"Mr. Ransom—I object to it as incompetent.

"The Master—Objection sustained.

"Mr. Chambers—Exception.

"Mr. Ransom—I offer to stipulate into this record all the testimony of all the witnesses who testified on the subject of gas oil for either the defendants or the complainant in the case of *Consolidated Gas Company vs. Newton*, before A. S. Gilbert as Special Master.

"Q. What were you paying for oil at the time this paper was dated here, Mr. Addicks, August 5, 1914?

"Mr. Ransom—I object to that as not the proper method of proving any such contract.

"The Master—Objection sustained, upon the ground that the 1914 prices are not in question here.

"Mr. Chambers—Exception.

"Q. Did you say you knew of the contract between the Boston Consolidated and the Gulf Refining Company?

"The Master—As of what period, Mr. Chambers?

"Mr. Chambers—Five year period, 1914 to 1919.

"Q. Were you acquainted with that?

"Mr. Ransom—I object to that as incompetent and not the proper method of proof.

"The Master—I will let Mr. Addicks answer that.

"A. I heard some testimony in regard to it, that is all.

"The Master—I am not going to have any more of what you heard. Do you know anything about that contract of your own knowledge?

"The Witness—Nothing, except what developed in the other case.

R. 351-3 [344-347].

As to the amount of oil used for enriching the gas, the evidence is sadly lacking in weight. There

is, in fact, affirmative proof of errors in the book records of respondent as is shown by the following testimony:

"Q. Mr. Morrison, I now show you paper marked 'Daily Record of Manufacture of New York & Queens Gas Company for the month of January, 1919,' which was produced by counsel for the complainant, and I will ask you to state whether that was the record that you had in mind when you testified as to the materials received and used (indicating)?

"A. It is.

"Q. And is this signature, 'M. Morrison, Works Superintendent,' your signature?

"A. It is.

"Q. You testified, did you not, that this was correct?

"A. I did.

"You testified that you had added up the columns and found them correct?

"A. I did.

"Q. I now direct your attention to the column marked 'Oil Used,' the figure in red '*ink*,' at the bottom of that column; 146,964 is intended to be the sum total of that column, is it not?

"A. It is.

"Q. Will you add that and see if it is not incorrect, or I will say to the witness fairly that we have added it up and it is 149,964?

"The Master—What does he make it?

"Mr. Neumann—146,964.

"The Master—Add it up, Mr. Morrison, and see what you make it. What is the answer, Mr. Morrison?

"A. (Making computation) 149,964.

"By the Master:

"Q. 149,964 is right?

"A. Yes.

"Q. So there is an error there?

"A. There is an error.

"By Mr. Neumann:

"Q. An error of 3,000?

"A. Right.

"The Master—What is that, in oil, Mr. Neumann?

"Mr. Neumann—Yes.

"Q. Directing your attention to the bottom here, to the words 'Used in Manufacture,' you have copied down this incorrect total of 146,961?

"A. Yes.

"Q. Whoever did it. And that figure there should be 149,961?

"The Master—What was the total gas manufactured that month?

"Mr. Neumann—I do not think that has any thing to do with it, if the Court pleases, at the present time.

"The Master—I would like to know.

"Mr. Neumann—What I am trying to develop at this time is this fact that the record is incorrect.

"The Master—How much gas was manufactured during the month?

"The Witness—32,963,000.

"Mr. Neumann—if the Master please, I object to that.

"The Master—How much?

"The Witness—32,963,000.

"The Master—What difference would it make, the 3,000 gallons of oil, in the quantity of oil used per thousand?

"The Witness—Very little."

R 578-9 [814-815].

Another error in the oil records is shown in the testimony of Superintendent Morrison. In reproducing this excerpt from the record we also draw attention to the attitude of the Master. He took the position that if appellants show an error on a

page of respondent's records and do not go through every figure in all of the books, it follows that appellants thus prove, by inference, that every other entry in the books is correct. Such a conclusion is manifestly unwarranted, and if carried out consistently would result in the burden of proof being shifted to the shoulders of the defendants. The testimony above referred to is reproduced below:

"Q. That would leave a balance of how many, or how much?"

"A. (Making computation.) 158,606.

"Q. What is the figure you have there?

"A. 158,378.

"Q. That is a difference of 228?

"A. Right.

"Your figure, then, as the balance on hand on the 4th at 7 A. M. is incorrect?

"A. According to that it is.

"Q. Is there any doubt in your mind that your figure is incorrect?

"A. Well, the figures are correct there.

"Q. The figures are correct on the sheet?

"A. Yes.

"Q. Despite what I have shown to the contrary?

"A. Yes.

"Q. Explain, then, how you figure out 158,606 should be on hand on the 4th?

"A. Wait a minute, this figure is correct, 158,606.

"Q. That is correct?

"A. It is correct.

"Q. And there is a difference of 228?

"A. Yes.

"Mr. Neumann—These are all on the question of their correctness, that is what I am endeavoring to demonstrate.

"The Master—I am letting you show it. I do not see how it will help us any.

"Mr. Neumann—Here is a man who has

sworn these figures are correct and they go into the books.

"The Master—And the other answer to them is that except for the errors you show you are putting them up.

"Mr. Neumann—All right, I am taking a chance on that.

"Mr. Ransom—And Mr. Teele's exhibits are made up on a basis which this does not in any way challenge.

"Mr. Neumann—Mr. Teele says that he took these and checked them. If Mr. Teele's figures are wrong, this is wrong.

"The Master—I am indicating to you, Mr. Neumann, the impression that you are making on my mind, that the moment you prove that error on the sheet, you prove up the sheet. You show the amount of coal used and the quantity of oil used. I think you are helping the complainant's case.

"Mr. Neumann—And in view of the state of the record I have offered it, and I do not think that any reviewing court will determine from that that it had been proven.

"The Master—Very well, go ahead.

"Mr. Neumann—These are intended solely and wholly to impeach the witness' testimony.

"The Master—But you are making other evidence while you are doing it.

(R. 582-3 [820-1].)

These excerpts from the testimony do not complete the record of errors made in the books relating to the amount of oil used (R 585-6, 602-3). We claim that Mr. Neumann, by the questions put to Mr. Morrison, cast serious doubt upon the records relating to the amount of oil used. Inasmuch as Teele's tabulations of cost were taken from the books, and Morrison's records form one step in the process of getting the figures of cost on the books, Teele's figures are proved unreliable to the same

extent as the underlying figures on which he had to rely.

For the reason that appellants were not in a position to call witnesses to testify concerning the fair cost of oil or the reasonable quantity to be used in the manufacture of gas, we can make no definite claim regarding the just amount that should be allowed in the operating expense for gas oil. However, in view of Wood's testimony in the Consolidated case, referred to in the present case (R. 434), that 4.1 gallons per M. feet of gas made is the reasonable amount, and noting the use of 4.19 gallons in respondent's plant during the year 1919, when errors in the plant records were admittedly made; and taking into account the testimony of Morrison, which evidently impressed the Master on account of the large amount of oil reported used (R. 607), we respectfully suggest that the respondent cannot complain if the fair quantity of oil is found by this Court at 4.1 gallons per thousand cubic feet of gas made. The price paid to the Standard Oil Company in 1919 was undoubtedly high, but to what extent we cannot determine from the record. Using the price shown in Teele's tabulations (R. 1569) \$0.067 per gallon, and 4.1 gallons per thousand, the expense would be \$2.747 per thousand cubic feet as against the book figures for the year 1919 (R. 1569) of \$2.82. The saving would therefore be .73 cents per thousand cubic feet of gas made and .83 cents on the basis of each M. cubic feet of gas sold, allowing for the cost of the unaccounted for gas.

The next important item of expense is for Gas-making Labor, the books recording \$.0631 per thousand cubic feet of gas made and Wood's figures being \$.0671 per thousand. It is evident that the

testimony of Spear was not intended to prove the expense incurred for gas-production labor. The Master commented on the fact that Spear merely described the system in use:

"Q. What is your system of keeping track of the labor elements entering into your various departments?"

"A. The superintendent has a distribution sheet for each employee, each man at the plant, and——"

"Q. He has a time card, which permits of a showing of the distribution of his time?"

"A. Yes."

"Mr. Neumann—Why not let the witness say it, Mr. Ransom? He was going along in good shape.

"The Witness—Yes, he has a distribution sheet, with the man's name on it, and then it has the various accounts on the upper part, and the dates down the side. It runs for a month. He puts the man's name down opposite each account that he worked the previous day, and then once a week he totals it and makes up his payroll from that, and the payroll goes through the accounting department. At the end of the month this distribution sheet is checked and the distribution put on the back of the payroll."

* * * * *

"Mr. Chambers—I think we ought to object to that. I think he is going too far, and you ought to get that information from the person himself. I object to it as incompetent, irrelevant, immaterial and hearsay."

"The Master—I think the witness is just describing a system."

"Mr. Chambers—if it is limited to that, I think that might be all right."

(R. 184-5 [613]).

The Master, in the Consolidated Gas case, accepted the books in evidence without requiring proof of the entries therein. In the present case the same Master seemed inclined at the beginning of the trial to insist upon proper proof, but in the end he let the books in with no better evidence of their accuracy than he had in the Consolidated case.

"Q. Will you describe what books of account and subsidiary records were kept by the New York and Queens Gas Company during the years 1919 and 1920.

"The Master—Do you believe that this will be a case where I am forced to take in general books of account, the same as I did in the Consolidated case?

"Mr. Ransome—I so think.

"The Master—I should not imagine it would be very difficult to put in somewhat better proof here.

"Mr. Ransom—I think we will be able to produce somewhat more detailed proof in certain respects.

"The Master—You can have the man who made the entries in books, I imagine, and bring in the original papers, with a small company like this.

"Mr. Ransom—We can do something like that.

"Mr. Tobin—Mr. Master, I think Mr. Neumann's objection is good—that is, his last objection. There is nothing shown yet that Mr. Spear is in real touch with the books of the company.

"The Master—His objection was not good, Mr. Tobin, because the inquiry was simply, what did he have to do with them. Now he has told us what he had to do with them. There may be another objection come along based on that; but that objection was not useful.

"Mr. Neuman—It was a very clumsy ques-

tion, and I did not get the purport of it, myself.

"The Master—What was the last question?

"Q. (Repeated by the stenographer.)

"A. General Ledger No. 4—

"Q. Which covers what?

"A. January, 1919, to date.

"Mr. Neumann—You are now reading from a memorandum, are you, Mr. Spear?

"The Witness—Yes. General Journal No. 5, from September, 1918, to date; General Cash Book No. 3, July, 1916, to date; Accounts Payable Ledger, No. 1, January, 1919, to date; Operating Expense Ledger No. 2, January, 1919, to date.

"Subsidiary to that, are the Accounts Receivable Ledger, Sundry Debtor Blotters, then Consumers' Ledgers A. to L, inclusive, and K, and four Prepayment Ledgers, Bill Register, Pay Rolls, Vouchers and reports of various departments."

There was not one witness called on behalf of respondent to testify as to the original records of labor cost incurred at the plant. Mr. Teele, a certified public accountant, who made tabulations from the books, described the nature of the work done by his men, under his direction, in making a limited audit of certain records, covering a period of four months, kept by respondent. (R. 220-29 [122-138]). He also testified:

"A. Then into the journal and from there into the ledger account from which these statements were compiled.

"As to expenditures for labor, the company has three different payrolls, office pay roll, works pay roll and shop pay roll.

"The first pay roll—the distribution of the office payroll—it has entries upon it, and the entries distributing that pay roll were traced

from the pay roll itself to the journal and from there to the ledger.

"The shop pay rolls are distributed in accordance with the endorsements appearing upon the pay rolls, and the payrolls themselves, the endorsements are made up by taking the monthly distribution sheets of the individual workmen whose names appear upon the shop pay rolls, and compiling those for the month. The total amount to be charged to each account is then endorsed upon the back of the shop pay roll.

"A similar method is followed in the case of the works pay roll. The monthly distribution of each man's time is shown upon the sheet for each man. Those sheets are compiled, the total amounts being charged for each account being the aggregate total pay roll for the month, is then endorsed upon the pay roll. The accounts to be charged, and the amounts to be charged against each account, are shown by this endorsement and entered in the journal, and from there posted into the ledger accounts.

"Q. Then so far as the cost of labor, so far as the men in the manufacturing department and the other departments of the company are concerned, these exhibits 64 and 65 for identification have been checked both to the books and to the various payrolls?

"A. And to the various pay rolls.

"Q. And the books were likewise, as postings, checked back to the pay rolls?

"A. The postings appearing in the ledgers were checked back to their original sources.

"Q. The postings in the ledger were traced back to their sources?

"Q. The postings in the ledger were traced back to their sources?

"A. They were.

"Q. What if anything was done by you to verify and check the correctness of these departmental pay rolls?

"A. I have just stated how these pay rolls are compiled. We checked the monthly distribution sheets against the several monthly pay rolls, both the shop pay roll and the works pay roll. In the case of the shop pay roll I took four months in 1919, and went back to the individual daily workmen's time sheets. That is a sheet made out each day by the workman, indicating the work upon which he is engaged and the number of hours he was engaged upon that work.

"Mr. Neumann—I object to that on the ground that there is nothing here shown as to this witness' knowledge and ability to testify as to what any particular workman did.

"The Master—Objection overruled.

"Mr. Neumann—Exception.

"Mr. Tobin—Exception.

"A. (Continued). I checked the four months of these individual sheets against the monthly sheets, and then checked all the monthly sheets to the monthly journal entries where the distribution of that time is indicated, and charged to the various ledger accounts.

"Q. What about the works pay roll and the manufacturing department pay roll? What checks back did you make on those?

"A. *There is nothing, so far as I could find, back of the monthly sheets kept for each man.*

"Q. There is a monthly sheet kept for each man?

"A. There is a monthly sheet kept for each man in which the days of the month are set down on the left hand side, and the accounts to be charged are at the tops of the sheets, and the time each day for each man is put on those sheets.

"Q. And charged to different account numbers?

"A. Charged to different account numbers.

"Q. Those being the various uniform system of accounts lettered accounts, or by numbers?

"Mr. Neumann—I object to that as incompetent, irrelevant and immaterial and no foundation laid."

(R. 228-9 [136-8]).

Martin Morrison was called as a witness by respondent. He is the Superintendent of the gas works at Flushing (R. 569). His direct testimony covers just about eight pages of this record, two of them devoted to his qualifications. His testimony, as to labor expense, is of a very indirect character as may be noted by the following excerpt:

"Q. Do you keep a daily manufacturing record?

"A. I do.

"Q. Of the operations of the company at the works?

"A. I do.

"Q. Is this record kept on a large sheet covering the entire month?

"A. It is.

"Q. Are the entries thereon made daily showing the results of operations for each day?

"A. They are.

"Q. Who makes the entries on this record?

"A. The clerk, when I have one. When I have not I do it myself, personally.

"Q. When the record has been made up, either by yourself or by a clerk, do you personally check the accuracy of the entries and the computations?

"A. I do.

"Q. That is, you always go over both the computations and the entries?

"Mr. Neumann—That is objected to as incompetent, irrelevant and immaterial and a conclusion.

"The Master—Overruled.

"Mr. Neumann—Exception.

"The Master—What is your answer, Mr. Morrison?

"A. I do.

"Q. What is done with this report at the end of the month?

"A. It is totaled and sent to Mr. Spear.

"Q. Is it certified to by you?

"A. It is certified to and signed by me."

(R. 574 [806-7]).

On cross-examination he was interrogated as to the making up of the work's pay-roll:

"Q. Have you anything to do with the pay-rolls, the works?

"A. Yes.

"Q. What part do you have to do with the work's payroll?

"A. I make it up.

"Q. You make it up each week?

"A. Each week.

"Q. That is, you certify to the works pay-roll?

"A. No, I make it up and certify to it as well.

"Q. Then you turn that payroll over to whom?

"A. To Mr. Raynor.

"Is that the only payroll that you make up, the works payroll?

"A. That is all.

"By the Master:

"Q. Do you carry anybody on that payroll that is not actually employed?

"A. Absolutely not.

"Q. Do you carry any amount in there that is not actually paid?

"A. No, sir.

"Q. Do you carry any man that you don't actually need?

"A. We can't get all we need.

"By Mr. Tobin:

"Q. Does your position as superintendent extend beyond the actual manufacture of gas?

"A. No.

"Q. The work in the office is in charge of someone else?

"A. Yes, sir.

"Q. Your work is entirely that of the works?

"A. Entirely.

"Mr. Tobin—We would like, if the Master please, an opportunity to—

"The Master—Have you asked everything that you are prepared to ask?

"Mr. Tobin—at this moment, yes.

"Q. Who makes up the shop payroll?

"A. I don't know anything about the shop.

"Q. You don't know who makes that payroll?

"A. No, I do not.

"The Master—Now, are you all through?

"Mr. Tobin—As far as I can at this time determine,

"The Master—Have you anything else to ask now?

"Mr. Tobin—No, sir.

"The Master—Have you, Mr. Neumann?

"Mr. Neumann—Not at the present time.

"The Master—The cross-examination is ended. I shall permit you, however, to recall Mr. Morrison for further cross-examination before I permit counsel to rest his case. I want to protect the complainant against anything happening, that is all.

"Mr. Neumann—All we want is a reasonable opportunity to take this up, in view of Mr. Frank's situation.

"The Master—I am protecting the party that called the witness, and I am going to give you an opportunity to recall him if you find you have any more questions to ask him."

(R. 599-600 [848-850].)

It is evident that the mere making of the payroll, and the ready answer of Morrison, to the Mas-

ter's question, that he pays only men that are employed and that he needs, does not constitute proof that the books accurately reflect the proper and reasonable expense of producing gas. It does not follow, because certain moneys are paid to men employed by respondent, that the expense reported incurred is properly allocated on the books to production or capital account.

Wood's testimony concerning the labor cost at a hypothetical plant did not cure the defects of proof in respondent's evidence anent labor charges. Wood's testimony as to gas making labor is as follows:

"Q. What employees, in your judgment, are necessary for the efficient and proper operation of the plant that we have been describing?"

"The Master—Of this Flushing plant, what kind of repair labor do you need?"

"Mr. Ransom—I am speaking of gas-making labor first."

"The Master—Well, gas-making labor."

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial, already covered by Exhibits 58 and 59—or Exhibit 58 only."

"The Master—Overruled."

By the Master:

"Q. You have set out on this statement you have prepared the various kinds of gas-making labor and the number of men needed, have you not?"

"Yes, sir."

"Mr. Ransom—And the rates of pay."

"Q. And the rates of pay?"

"A. Yes, sir."

R. 419-20 [461-2].

The Master took Wood's estimate of cost as evi-

dence that the book records of production cost are reasonable, as appears from the following:

"The Master—No, I have taken them on the same theory that I took them in the Consolidated Gas case. I do not want to rely entirely on the books as indicating a result, nor do I want to rely entirely on the sworn testimony of the witness' opinion; but when I find, assuming that I am satisfied in this case that the books have been properly and correctly kept, and in due course of business, that those operating records actually show substantially what Mr. Woods says the plant will do, and when there is no other witness to take issue with Mr. Woods as to what a plant like this, or this plant, will do, I am quite satisfied that the figures shown to me, checked up by operating results are correct. To illustrate what I did in the Consolidated Gas case, I took Mr. Woods's statement of what he thought it ought to do, I checked it up by operating results as per the books. In some instance I found that the books show slightly less coal or fuel used than the quantity Mr. Woods said ought to be used, and I therefore felt that the operating results appearing from the books, in the light of the sworn testimony given by Mr. Woods, could be relied on, and I did rely on them, and I based my decision on the books themselves and the operating results.

"That is what I am going to do here. If when I get the books before me, and Mr. Teele's exhibits, I find that the operating results tally with what Mr. Woods says it will do and should do, and I do not hear any other witness come on the stand and take issue with Mr. Woods on the quantity of coal and oil used—

"Mr. Cummings—Why didn't they do that first?

"The Master—The books are in evidence; Mr. Teele put the books in evidence. I want

his testimony confirmative and corroborative of the books' actual operating results. That to my mind is one way of getting a good result.

"Mr. Chambers— I want to say on the record that if we do not challenge Mr. Woods' hypothetical figures and you draw the inference we cannot challenge them. I want to say you will be mistaken, because we rely on the fact that you cannot do this, as Mr. O'Brien says, in capsule form.

"The Master—All right, you take your chances on that.

"Mr. Chambers—We consider it incompetent.

"The Master—The record before me is the testimony of Mr. Woods' that certain quantities are necessarily used in the efficient operation of this plant, and if there is not any sworn proof to the contrary, I am going to assume that there cannot be any.

"Mr. Chambers— You will be in error if you do that.

"Mr. Cummings—Then you shift the burden on to us.

"The Master—The burden is on you when Mr. Woods comes in and says that it takes a certain quantity of coal and oil and labor to produce a thousand cubic feet of gas.

"Mr. Cummings—Not in a plant of his own creation.

"The Master—In any plant—and the books show that it does substantially that very thing, the burden shifts to you to show that it is wrong.

"Mr. Cummings—But the minutes you let him create a plant in his own mind, that is different.

"The Master—The record shows what it is.

"Mr. Ransom—This may be marked.

"The Master—Yes."

Woods' figures on labor were shown to be unreasonable by the cross-examination, as appears below:

"Q. Now, Mr. Woods, gas-making labor, in the Consolidated case you fixed a figure of $2\frac{1}{2}$ cents per thousand cubic feet.

"A. I did.

"Q. Here you jump that to 6.71 cents.

"A. Yes.

"Making a difference of nearly $4\frac{3}{4}$ cents?

"Mr. Ransom. That was last September. There have been several increases in pay since then.

"Q. And it is 4 cents, nearly $4\frac{1}{2}$ cents more per thousand cubic feet?

"A. Yes.

"Q. Did you base that on any records of the company?

"A. No, I know the number of men required to operate a plant of that kind.

"For instance, you have a gas-maker who handles a million feet a day, in three shifts they would make a million feet for each of these machines, and in a larger plant, where they had larger machines, in a plant capable of handling larger machines that same gas-maker would make three million, so for the gas-maker himself it would be three times as much as in the large plant where they have these large individual units. You could not afford to put up individual units of that kind in a plant like Flushing, you would have to rebuild the plant entirely in order to handle the proposition.

"Q. Four cents more to gas in a million cubic-foot company than in a ten million company.

"Mr. Ransom—I object to that. He is comparing September, 1919, with April, 1920, whereas the proof in the Consolidated case showed two increases in pay after the September figure.

"The Masters—Objection overruled.

"Mr. Ransom—Exception.

"A. The gas manufacturing labor in a plant such as exists there would be infinitely more than in a plant making ten million cubic feet a day.

"Q. You figure one superintendent here at \$5,750?

"A. Yes, sir.

"Q. In the Consolidated how many superintendents did you figure?

"A. One superintendent.

"Q. At the same price?

"A. No.

"Q. How much did you give him?

"A. I don't recall the testimony that I gave now. I wouldn't like to give it offhand again.

"Q. Wouldn't the superintendent be about the same?

"A. No, the superintendent in a larger plant would be getting more money.

"Q. \$5,000 a year—that is what you testified to in the Consolidated case, isn't it?

"A. Right.

"Q. How much a year would you give the superintendent?

"A. That figures, I think, about \$2,100, including his house rent, or, he lives in the plant. I make it on a ten million a day, with a man getting \$5,000 a year. Here is a plant making one million a day, and the superintendent getting \$2,100 a year.

"Q. Plus his house?

"A. Plus his house.

"Q. How much do you figure that at?

"A. I didn't figure his house. I suppose it would be \$600 to \$700 a year.

"Q. That would make about \$2,600 or \$2,700.

"A. Yes.

"By Mr. Ransom:

"Q. House rent is not in this figure, is it?

"A. No.

"By Mr. Chambers:

"Q. You have a clerk here at what, \$4 a day?

"A. \$4 a day.

"Mr. Neumann—I move to strike out the question of counsel, because that house is figured in the plant.

"Mr. Ransom—Not in the \$5.75 a day figure.

"Mr. Neumann—But that is added in the whole plant.

"Mr. Ransom—We will add to these costs whatever you say the value of the house is.

"Q. You have not figured the superintendent's house in this?

"A. No.

"Q. Not a clerk—how many clerks did you have when you testified in the Consolidated Gas Company case?

"A. I don't recollect now.

"Q. More than one.

"A. One or two, probably a clerk and assistant.

"Q. And here you only have one?

"A. Yes.

"Q. You have three gas-makers here on this Exhibit 77?

"Yes.

"Q. At \$1.61 a day?

"A. An average price of—

"Q. How many gas-makers did you have when you testified in the Consolidated case?

"A. I don't recollect the number now. I would have to make the calculation again to find out. Gas-making labor on the other statement, there were so many things involved that I don't recall just now, unless I went into it.

"Q. You have three engineers here?

"A. Yes.

"Q. At \$1.93 a day?

"A. The law requires that we have the plant covered by an engineer at all times.

"Q. How many engineers did you have in the Consolidated case?

"A. I don't recollect the number; probably more than that.

"Q. More than three?

"A. Yes, because we have exhausted attendants and turbine attendants from time to time.

"Q. Now, two boiler firemen you have on Exhibit 77?

"A. Yes.

"Q. At \$1.18?

"A. Yes.

"Q. How many boiler firemen did you have in the Consolidated case?

"A. I don't recall the figure now; I would not undertake to give it to you from memory.

"Q. More than two?

"A. Yes.

"Q. Two generator firemen and coal passers you have here?

"A. Right.

"Q. At \$1.18 a day?

"A. Yes, sir.

"Q. How much did you pay - they were both firemen and coal passers?

"A. Yes, sir.

"Q. How many firemen and coal passers did you have when you testified in the Consolidated case?

"A. More than that; I don't recollect the number.

"Q. You have two laborers here at \$1?

"A. Yes, sir.

"Q. How many boilers did you testify to in the Consolidated case?

"A. I don't recollect.

"Q. Now, you have Sunday and holiday overtime?

"A. Right.

"Q. \$2,73?

"A. Right.

"Q. What does that \$2,73 relate to?

"A. Because some of these men are paid time and a half for overtime for Sunday and holiday work.

"Q. What is that?

"A. That is a percentage of their daily pay when they work Sunday and holidays, for which they get time and a half.

"Q. All those figures are based on your own idea?

"A. Those figures are based upon the rates of pay that are being paid by the Flushing Company. I know it requires that number of men to perform that work.

"Q. Were the same last fall?

"A. No.

"Q. Substantially the same?

"A. No, they were somewhat less, I think.

"Q. Were they?

"A. Yes.

"Q. How much less for gas-making?

"A. I don't recollect the exact amount, but I know there has been a change made since last fall.

"Q. In those very men at that plant?

"A. Yes.

"Q. But you don't know how much?

"A. I am not undertaking to say from memory just how much it was.

"Q. How do you explain the difference of four cents here to make a thousand cubic feet of gas than you testified to as of October 16, 1919?

"Mr. Ransom - I object to that as already fully covered.

"The Master - Objection overruled.

"Mr. Ransom - Exception.

"A. Because of the difference in the character of the plant and the unit which a man

can produce at that plant as compared with a plant such as I testified to. If you have one five-ton truck, Mr. Chambers, and five one-ton trucks, they cannot be as economically and efficiently operated as the one five-ton truck. The conditions might be such that you could not operate the five-ton truck and would have to operate the five one-ton trucks.

"Q. How many machines did you have in the ten million cubic foot plant, gas machines?

"A. I don't recollect, probably four or five machines, operating four or five machines.

"Q. That is only one more than you have here in this million cubic feet?

"A. No, we are operating those continuously. I had three to four machines in operation all the time in the ten million plant, with a standby for cleaning and recheckering.

"Q. How many machines in all in that plant?

"A. I think five or six machines.

"Q. That is three more than here?

"A. Yes, but different sized machines.

"Q. And yet you are able to run them for less than you with three machines?

"A. We are talking now about cost per thousand cubic feet. You can operate them for less per thousand cubic feet, naturally.

"Q. You testified in October that you could run, according to that, six machines four cents cheaper than you could run, so far as labor is concerned, three machines?

"The Master—Per thousand cubic feet?

"A. Per thousand cubic feet. I did not testify to any such thing, as you have asked the question.

"Mr. Ranson—The figure relates to the entire process of gas making, and not merely to the machine.

"Q. Well, what would you testify to in that regard?

"A. I testify that in a plant such as I testified to in October, 1919, as bearing upon the

Consolidated Gas Company's system, which did not include the Flushing Company in any sense, that a fair operating condition was two and one-half cents per thousand cubic feet for gas making labor.

"Q. If you had a plant of twenty million cubic feet capacity, could you operate it for less than these figures that you have in October, 1919?

"A. I could not.

"Q. There would be a decrease?

"A. No.

"Q. How about the other way, the converse?

"A. If you can operate a plant continuously anywhere from five to ten million—if you recall, Mr. Chambers, in my testimony, I testified to a plant on an average condition operating on ten million feet a day, and that plant would run anywhere from seven and one-half to fifteen or eighteen million. I took a fair operating condition throughout the year. At times the gas making labor would be somewhat less than two and one-half cents, and at other times it would be somewhat more than two and one-half cents, but I believe, under the conditions under which we were operating, a fair amount was two and one-half cents per thousand cubic feet.

"Q. This company out there does not make a million cubic feet a day?

"A. They do.

"Q. They make a good deal more than?

"A. They will make slightly more than that; they average that.

"Q. Didn't you hear testimony that it was 1,600,000?

"A. That is a maximum capacity. They probably gave you a send-out of 1,600,000. I do not recall the exact figure, but I think their annual send-out was around 375 to 380 million cubic feet make, which would be close to an average make of 1,000,000 a day. A million a day would be 365 million. Their average make was probably 1,050,000 a day.

"Q. They make sometimes 1,600,000?

"A. Yes.

"Q. Wouldn't that cut the cost down?

"A. Yes, and if they made less than a million it would probably bring it up.

"Q. Do they make less than a million that you know of?

"A. There are times when it must be less than a million to get an average throughout the year of slightly more than a million.

"Q. Then they could close down one of the machines and relieve some of these gas-makers and others.

"A. I took it as a condition of operating a million a day. At times their cost may be a little more, and at times a little bit less than that.

"Q. I don't quite understand these Sundays and holidays here—overtime. Mr. Woods, You didn't have that in the Consolidated case, at least not so we could see it.

"Mr. Ransom—I object to that as incompetent and not the proper way of proving a statement in the Consolidated case, which was made up on a somewhat different basis. He did not in his Exhibit 353 for Identification undertake to give the details of the different classes of labor and rates of pay. He submitted a separate statement which showed the rates of pay and of overtime.

"The Master—Objection overruled.

"Q. You didn't have any such item in your Exhibit 353 for Identification in the Consolidated case, did you?"

"A. I don't recollect. I think probably an allowance was made in figuring up the cost per thousand cubic feet that was taken into consideration. It was not shown in the Exhibit in the Consolidated case as it has been shown there.

"Q. Did you base this \$2.73 on the practice of the company?

"A. On the practice of the company, time and a half for overtime for Sunday and holiday work.

"Q. And that is based on that?

"A. That is right.

"Q. For these different men here?

"A. That is right.

"Q. Now, have they as many men as you have set forth there over in the plant?

"A. I should say they have, yes.

"Q. Well, do you know?

"A. I should say so.

"Q. That is, have they a superintendent, one clerk, three gas-makers, three engineers, two boiler firemen, two generator firemen and coal passers, and two laborers?

"A. I would say so, yes.

"Q. Are you sure about that?

"A. I am quite sure that they have that many men.

"Q. You don't know what they pay them over there, do you?

"A. I do.

"Q. Those prices?

"A. Those are the average rates. The gas-makers and engineers are not all paid the same rate. The average rate for those different classes is there.

"Q. The superintendent, do you know what he gets over there?

"A. I do.

"Q. What does he get?

"A. \$2,100 a year, I believe.

"Q. And his maintenance, his house there?

"A. His house.

"Q. Does he pay rent for that?

"A. No, he doesn't pay any rent that I know of.

"Q. Now, the clerk?

"A. The clerk I have there at \$1 a day. Just what they are paying the clerk I don't know. I don't believe they are paying quite that, be-

cause they have a new clerk they just put on, and he probably is not getting \$1. \$1 is what they will have to pay as soon as he is broken in.

"Q. What are the gas makers getting over there?

"A. The average rate is as indicated on that exhibit.

"Q. Then they have got three over there?

"A. Yes.

"Q. And three engineers?

"A. Right.

"Q. At these prices?

"A. Right.

"Q. That is, some of them are getting less, I take it, and some more?

"A. Yes, for all three that would be the rate.

"Q. Now, repair labor—they have two mechanics over there?

"A. Not always.

"Q. But you have two here steady?

"A. I testified that on the average they would have two. They may have two or three at one time and they may not have any for a day or two, because they have different classes of work to perform, and they have to call in men to get that work done; but in my judgment the average employed on repair work would represent what I have indicated on the exhibit.

"Q. A helper—have they got a helper over there?

"A. They would have when the work is going on.

"Q. Isn't work going on?

"A. There is always some minor repair work going on. On other days there may be some extensive repairs where they will want to put extra men on the work.

"Q. Is that a pretty high price, \$1?

"A. That is the best we can get. It is a question of how long we can get that. We are

paying more than that for a good many of our laborers now.

"Q. Labor is very high now?

"A. It is considerably higher than it was last October when I testified, and it looks as if it might go higher still, due to our present inability to get men.

"Q. You don't know whether it will ever stop, do you?

"A. God knows I hope so."

(141-148 [499-510].)

The foregoing testimony was not corroborated by General Manager Spear, as appears below:

"Q. Taking the item off gas-making labor, has the company employed at any time during the year 1919 any more than one superintendent?

"A. No.

"Q. Has employed how many clerks in that particular branch of the works?

"A. One.

"Q. And how many gas-makers?

"A. Three.

"Q. Is that the average, three, or is that the extreme number employed?

"A. Three would be the extreme number, except that we have an extra man broken in in case of sickness of one of the gas-makers that could take his place, but we only use the three where we are running three shifts.

"Q. Taking the twelve months, for how many months would you employ three gas-makers during the year 1919?

"A. I can't tell that without looking over the records.

"Q. Would you employ two gas-makers for most of the year?

"A. That is pretty hard to say. I say possibly two and a half for the year 1919, it might average that.

"Q. It would average about two and a half?

"A. It might; I can't tell, except from the records.

"Q. That would be your judgment?

"A. I would not want to say positively on that without a study of it."

(611-2 [918].)

It is our belief that an allowance for labor used in the production of gas, based upon the record, should not exceed 5 cents per thousand cubic feet. This we arrive at by averaging the amounts testified to by Woods in the Consolidated case and in the instant proceeding (R. 441). The actual figures in the record are, respectively, 2.5 and 6.71 cents, and an average of the two would be 4.6 cents, which we call 5 cents. The saving as compared with the book cost of 6.31 cents, would thus be 1.31 cents per thousand, or, on a spread of 336,211.4 thousand cubic feet, the saving would be equal to \$1,401.76, on the basis of gas made, or nearly \$5,000, on the basis of per thousand feet sold. The next item of consequence in the cost of producing gas is the alleged expense incurred for repairs to works, reported by Teele as \$0.0735 per thousand cubic feet of gas made (R. 1570). Even Woods, respondent's expert gas engineer, could not vouch for the reasonableness of such a cost, his estimate being \$0.0530 per thousand cubic feet (R. 1597). Woods' figure for repair material in the hypothetical plant is just twice as much as he testified was reasonable in another hypothetical plant that was used as a basis by him in the Consolidated Gas case (R. 449).

"Q. Your Exhibit 353, for Identification in the Consolidate case was not based on the Consolidated plant, was it?

"A. It was based on their rates of pay, of the system.

"Q. Now, the repair material, you have 3 cents here?

"A. Yes, sir; right.

"Q. And in the Consolidated case you had 1½ cents?

"A. Right.

"The Master—Why should the repair material cost any more?

"The Witness—Because your Honor, in making repairs for instance, in repairing machines and repairing the steel work, repairing the door-frames, all these repairs that must take place, these machines won't run any longer a period of time than with the larger machine, but the unit of production is considerably less, so that the actual cost of repair is practically the same as on the larger amount, but, owing to the production the cost per thousand cubic feet is lower.

"The Master—Do you think 3 cents is pretty liberal?

"The Witness—I think, taking it year in and year out 3 cents would be a fair cost of material.

"The Master—Then 4.69 is high?

"The Witness—I think taken on the average that would probably be a little high.

"Q. Don't you think you could cut that 3 cents down a little?

"A. No, I do not; if I had thought it was lower, I would have put it lower."

(R. 449-50 [513].)

It is our firm belief that the matter of maintenance cost in a gas works is one requiring close scrutiny. It is obvious that the repairs may be deferred during periods of stress such as arise during war times, and this means an abnormal amount of repair work has to be undertaken at a later period. Take as an illustration the figures

appearing in appellant's Exhibit A-14, which we reproduce below:

Repairs, Works and Holders.

Year	c. per thousand cubic feet
1909	1.53
1910	1.75
1911	2.21
1912	2.20
1913	2.25
1914	2.26
1915	2.18
1916	2.50
1917	2.65
1918	3.52
1919	7.35

The expense for 1919 is obviously unreasonable. An average of all years prior to 1919 shows a cost of 2.305. If we add 50 per cent. to take care of increase in cost of labor and material, the cost would be less than 3.5 cents per thousand cubic feet of gas made. We claim that anything over that would be excessive. As compared with the Master's finding, based upon the books, that 7.35c. per thousand is reasonable, this fair cost of 3.5c. would result in a saving of 3.85c. per thousand cubic feet of gas made, and on a spread of 336,241.4 thousand feet, the reduction in operating expense would amount to \$12,945.29 per annum, on the basis of gas made, and of close to \$14,600 on the basis of the gas sold.

The next item meriting consideration is the cost of making that part of the gas which is subsequently not accounted for. Teele's tabulation reports the expense for this leakage and condensation loss at 8.28 cents per thousand cubic feet—

the difference between \$6345 (R. 1570) and \$7173 (R. 1571).

The Master found (No. 23) that "so-called unaccounted-for gas, in the instance of the complainant company, reasonably represents approximately eleven per cent. (11.63 per cent.) of the gas made, and that in calculating the requirements of the complainant, that percentage should be used as a basis for computation" (39). The Master on this occasion did not place the reliance on Woods' opinion testimony that he indicated he would. He accepted the book figures, notwithstanding that Woods' testimony shows the amount of gas reported last is excessive.

"Q. Mr. Woods, taking into account all of the factors known to you and appearing with reference to the New York and Queens Gas Company, do you consider 10 per cent. of gas made as the percentage of gas unaccounted for a reasonable or an unreasonable condition?

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial.

"Mr. Hyatt—And nothing shown here as to his experience with other companies.

"Mr. Neumann—It is not shown as within this witness' qualifications, not the subject of opinion testimony, and highly speculative.

"Mr. Hyatt—In this particular field he has not qualified, your Honor, as I remember it, as to the unaccounted for gas of other companies.

"The Master—Objections overruled.

"Mr. Neumann—Exception.

"The Master—Any man who has run a gas plant for twenty years knows something about other gas plants.

"Mr. Hyatt—He has been with the company for twenty years, but I do not know that he had anything to do with unaccounted for gas of other companies.

"Mr. Chambers—We should try this case on the facts in it.

"Mr. Neumann—He may know something about congested districts, but he does not know—

"The Master—He has been connected with this company since 1901.

"Mr. Chambers—Well, as to the unaccounted for, what is the use judging from his experience in other companies? You are going to judge this case on the experience with this company.

"The Master—I think so, but I will take this witness' opinion.

"Mr. Chambers—What does it show from 1906 down to date as an average?

"The Master—I do not know yet.

"Mr. Hyatt—It is a very easy way to prove a case, your Honor, in the absence of any particular records.

"Mr. Neumann—We have not a large case here, we have a case where they can prove the facts, and the law requires they must prove them beyond a reasonable doubt. This is an important issue in the case, the unaccounted for gas.

"The Master—I know it. I understand how important it is, and that is why I welcome the testimony of a sworn witness, who swears that 10 percent, is or is not reasonable, so that you can cross-examine him and show that he is wrong about it. I would rather rely on that than on the books.

"Mr. Hyatt—I would rather find out the extent of his knowledge.

"The Master—You will have plenty of time for that.

"Mr. Chambers—Exception.

"By the Master:

"Q. Is it or is it not a reasonable loss?

"A. A reasonable unaccounted for, your Honor.

"Q. You think it is?

"A. I do.

"Mr. Hyatt—The witness in the Consolidated case said it was otherwise."

(R. 408-9 [443-5].)

On being cross-examined as to the percentage of gas lost, Woods testified as follows:

"Q. Now, you would not be surprised, would you, if the unaccounted for gas, according to the company's own statement for 1917, was 7.96 per thousand cubic feet?"

"The Master—For what year?

"Mr. Chambers—1917.

"A. I should say that if that is the record—I don't recall what it is—it has probably gone from 8 to 16 or 17 per cent.

"Q. There is 7.96 for 1917, and 8.07 for 1918?"

"A. Well, the weather conditions would have something to do with that. If you will refer to previous years you will find it is higher, and for 1919 it was more than ten per cent."

(439-40 [496].)

The amount of unaccounted for gas in 1917-1918, respectively 7.96 per cent. and 8.07 per cent. would appear to be more convincing evidence of the fair amount than the abnormal year 1919. The average of the two years is 8.015 per cent. An allowance of 8 per cent. is sufficient for the purpose, in our opinion. In this connection, we refer to the opinion of Judge Hand, in the Consolidated Gas Company case, that in Manhattan the fair amount of unaccounted-for gas should not exceed 4.1 per cent. In that case, the Master, who was the same as in the instant case, found:

"after listening to the testimony given by Mr. Woods and by the defendant's expert, Mr. Little, and after analyzing the various reports of the various companies and the experiences of the various companies, and the explanations of Mr. Woods and the statements of Mr. Little with reference to it in this and other cases, I am convinced that 7 per cent. of the gas made must be figured as unaccounted for gas."

Judge Hand disagreed with the Master in that case and fixed the percentage at 4.1. In the instant case, Judge Mayer also disagreed with the Master. He said:

"This percentage varies. Some years it may be more, others less. Therefore, the estimate of an expert like Mr. Woods is valuable. This plant, in his opinion, should show a loss of about ten per cent. and I accept that figure, for the purpose of this case, instead of 11.03 per cent."

(R. 111.)

We do not believe this Court will allow such an excessive amount on the mere expression of an expert. The year 1919 being abnormal, the book records should not be taken even if proper proof had been submitted on the matter of gas made and gas sold. No injustice will be done to respondent if the percentage of unaccounted-for gas is fixed by this Court at the average of the years 1917, 1918, or just a shade over 8 per cent., which is nearly double the percentage found to be reasonable by Judge Hand in the Consolidated Gas case. The expense beyond the holder, commonly referred to as "Distribution Cost" was not properly proven by respondent. The Court below disallowed:

- (a) Defensive Emergency Service.
- (b) Expenses of Litigation.

- (c) Interest on Unpaid Taxes.
- (d) Federal Tax on Bondholders' Income.
- (e) Income from Insurance Participation.

In this way, the book costs were reduced from 42.07 cents per thousand feet to 37.14 cents. We contend that "Uncollectible bills" should not be figured as an operating expense where a company, as here, is allowed to collect in advance from its consumers a sum equal to two months consumption of gas. This item appears as an expense amounting to \$.0040 per thousand cubic feet (R. 1572). Interest on consumers' deposits should likewise be disallowed. The respondent collects that money and can do what it pleases with it. If placed out at interest the return would be equal to the amount that respondent figures it has to pay to the consumers in the form of interest. The amount of this expense is equivalent to \$.0048 per thousand cubic feet.

Summing up our contentions on this matter of operating expense and taxes, we set up the following table.

TABLE I.
Summary of Adjustments to Operating Cost.

Brief p. No.	Item	Cost per M. ft.	Total Saving
46	Cost of hauling coal.....	\$0.02825	\$9,498.82
46	Generator coal .....	.00630	2,118.32
47	Boiler coal .....	.02750	9,246.64
67	Gas oil .....	.00830	2,790.80
90	Gas-production labor .....	.01487	5,000.00
92	Repairs .....	.04342	14,600.00
91	Uncollectible .....	.00400	1,344.97
97	Interest on deposits.....	.00480	1,613.96
97	Deduction by Court.....	.04930	16,576.70
Total of reasonable savings		\$0,18674	\$62,790.21

Master's findings (No. 48) (R. 44).

" Net loss from gas business.....	\$9,074.70 "
Possible savings, as shown above.....	\$62,790.21
Loss converted to Profit by taking into consideration reasonable operating expense in a fairly well-designed water gas plant, year 1919.....	\$53,715.51

II.

This company has had the benefit of a fair average return within the meaning of the statute governing public utilities in the state of New York and a fair average return more than sufficient to overcome any claim of confiscation.

In *Municipal Gas Company v. Public Service Commission*, 225 N. Y., 89, 98, 99, Judge Cardozo** stated:

"For more than nine years, the statutory rate was adequate. Abnormal conditions brought about a change, and now, when the return is figured upon the value of the property, the outcome is said to be a deficit. The defendants argue that courts must pay some heed to the average results; that the prosperity of one year may atone for the adversity of another; and that confiscation does not ensue unless there has been an unreasonable extension of the period of dearth. *That dearth does not signify confiscation unless unreasonably prolonged, may be assumed to be true.* (*Darnell v. Edwards*, 224 U. S., 564). The difficult thing is to determine where the line is to be drawn. Its location will vary with the nature of the business, the exigencies of the present and the chances of the future. There is no other test than the rule of reason and fairness (*Cedar Rapids Gas L. Co. v. City of Cedar Rapids*, 223 U. S., 655, 669). One cannot crowd the governing principle into any formula more definite. It will seldom be important that rates have been inadequate for a

day or a week or a month. *Fleeting losses may be suffered and yet the balance sheet may show a profit.* Prolong the losses, however, for a year, and you may reach and cross the danger line. It is by the average of the year that business commonly reckons its losses and its gains. *On the other hand, there may be times when the average must be distributed over periods still longer.* We make no attempt to solve these problems now. We cannot solve them fairly until all the evidence is in. Then only can the changes and chances of the business be probed and measured. The case is here upon demurrer. The only question to be determined is the adequacy of a plea. * * *

"We have allegations that the bounds of moderation have been passed; that confiscation has resulted and will indefinitely continue. Unexplained and undenied, these allegations made out a *prima facie* case of the denial of a just return. It may, of course, be impossible to prove them. The deficit when analyzed may be dissolved. The apprehension of evil may be the vain forebodings of timidity. The conditions engendered by the war may linger for months or years, or may vanish with the coming peace. Those questions are for the trial." (Italics are ours.)

The picturesque and comprehensive language above set forth meets with the line of decisions handed down by this court and is in consonance with the very character of the subject matter involved. Specific reference is made to the following considerations:

- (1) That reference must be had to the nature of the business.
- (2) The exigencies of the present must be taken into account.
- (3) The chances of the future must be considered.

As for the chances of the future, Judge Cardozo takes into account the possibility of reconstruction as affecting alleged confiscatory rates by referring to the fact that conditions of abnormality might "linger for months or years or may vanish with the coming peace."

The summary, however, seems not to have included what must necessarily, of course, be taken into account; namely, the past.

In *Omaha & C. B. S. R. Co., vs. Nebraska State R. Comm.*, the Nebraska Supreme Court, through Cornish J., said (P. U. R., 1919, F), p. 308, at p. 309:

"The purpose of the law being to allow those who voluntarily furnish the necessary capital to install and operate such public utilities, a fair average return upon the value of the property so devoted to the public use, and to prevent unreasonable profits, in fixing the rate at any particular time, *former earnings and probable prospective earnings should always be considered with a view to so adjust the rate as to prevent extortion and allow such fair average return.*"

In *Darnell v. Edwards*, 241, U. S. 564, the question of the confiscatory character of rates fixed by a Commission was involved and the period of condition was about a year and a half. The Court, at page 569, stated:

"The evidence for complainant tending to show they were non-remunerative while based upon actual experience in the operation of the road, yet relates to only a brief period when conditions were abnormal."

And further, the Court said:

"But it is sufficient for the present to say that the experimental period was too brief

* * * and conditions during the entire period covered by the *testimony have been too abnormal to enable us to say that the Commission's rates are confiscatory.*"

As to what constitutes confiscation must depend upon the facts in each case. If a public utility corporation has been prosperous for a long series of years, but during the war, or immediately thereafter and as a result of an upheaval that was worldwide in its effect, earned a reduced return for a period of one year, and, as claimed, a slight deficit for a period of four months, it cannot claim the rate fixed by the Legislature is confiscatory. Particularly is this so where the period was extremely abnormal and where it was followed by a gradual and fairly rapid decline in the level of prices.

As previously pointed out, Judge Cardozo's statement of considerations which must be taken into account in determining whether a rate is confiscatory, refers only incidentally to past earnings and does not attempt to show just how they must be treated. He does, however, make the point that past returns are a factor, but the issue before him did not require a detailed analysis of the extent that they enter into the constitutionality of an existing rate.

The relation of past earnings to the constitutionality of an existing rate fixed by statute has never received a final judicial determination because it has never come as a direct issue before the courts. The point when made, as by Judge Cardozo, has always been merely incidental, indicating only that the Court realized that the issue existed, but not determining it because it was a minor matter and did not affect the particular decision.

In the present case, however, the appellants urged, and have urged throughout the trial before the Master, that *in passing on the question of confiscation, complete account must be taken, not only of the present earnings and future prospects of operation, but of the past earnings and returns realized under the rate fixed by statute.*

Evidence was presented before the Master, by the appellants, showing clearly that the respondent has received during the continuance of the rates fixed by statute, more than a fair return on its investment in the property used in public service. For many years under the statutory rate it realized excessive returns, which under proper financial management should have been reserved against the time when the revenues temporarily might not be sufficient to bring a full return. These earlier excesses must be considered as an accumulation of surplus or reserve for an equalization fund to provide a *fair average return* to the investors. The intent of the legislation was that the excesses of prosperous years should be used for deficiencies of poor years.

Facts as to prior earnings were offered in evidence by appellants to show that respondent earned more than a fair return since its organization and that there was no ground for setting aside the statute. The Master, however, refused to consider the relevancy of these facts, and based his decision altogether upon the alleged financial condition during the year 1919. By ignoring the facts as to earlier earnings he held, in effect, that the company is entitled constantly, each year taken by itself, to earn a full return on the investment, and that whenever in any year the rate fails to bring such a full return, it becomes confiscatory and in-

operative; also that excessive earnings during any period become the absolute property of the investors.

Appellants urge upon the Court that this view is erroneous, and that the Master should have taken complete account of respondent's earnings during the time the legislative rate has been in effect. It is this error, particularly, that renders the Master's opinion and findings unsound, and if it were sustained would place a gross injustice upon the gas consumers.

When the Legislature first fixed the rate for gas in 1906, by that very act it announced a new public policy in regard to the future gas supply furnished by respondent and other companies in New York City. Theretofore, respondent had been free, except as to the common law requirement of reasonable rates and fair service, to charge such rates as it deemed expedient. It had been substantially free *to charge what the traffic would bear*, without any attempt at public regulation or restriction. In 1906, however, the Legislature definitely exercised the right which had been recognized under the police power for many years, to fix definitely a rate which for the future should stand as a maximum. This was exercised for the general public welfare and was subject only to the limitation that it could not confiscate private property for such public purpose and thus required the allowance of a fair return on the investment.

But within the limits of this general constitutional restriction that a fair return must be allowed on the investment at the time this direct rate fixation was put into effect, the Legislature was free to determine the policy to be pursued for the future in reference to gas rates. By fixing the rates in

1906, therefore, the Legislature virtually made the direct announcement that this would be the maximum rate, unless it came clearly to be confiscatory. Further, this announcement carried the clear implication that the company would be entitled to earn only a fair return on its investment and no more, if the question were to arise whether the rate so fixed was confiscatory.

This announcement of new policy in 1906, when the Legislature fixed the rate by statute, was subsequently reinforced in 1907 by the enactment of the Public Service Commissions Law, by which the Commission was directed in fixing reasonable rates to have due regard to *a fair average return on actual investment* in property used for the public service, and to make due allowance for surplus and contingencies. The clear purpose of this provision, which corresponds with common sense and the practical necessities of rate regulation, was that rates should be fixed from the standpoint of a long term policy; that there should be certainty and stability, and no change unless it could not be reasonably avoided. The plain intent, therefore, if the Acts of 1906 and 1907 are considered together, was that the gas rate fixed by statute should continue as a maximum so long as it remained constitutionally valid. The Commission had full power to reduce the rates when there were excessive earnings, but not to raise them. But it also had the right for the purpose of maintaining stability to leave the rate in force even if there were excessive earnings, with the view that the excesses should be accumulated as surplus under the terms of the statute, to be employed as an equalization fund during periods of inadequate earnings or loss. Respondent, therefore, is entitled

to a fair average return on its investment and no more, and was in duty bound to conserve the greater earnings of "fat" years for the "lean." It is not entitled to an increase in rates when "lean" years appear until the previous excesses or surplus have been consumed.

As the record shows, under the rates fixed by the statute, respondent realized excessive earnings for many years, and the Commission might properly have reduced the rates, but did not do so under its discretion. It thus conserved the excesses as an accumulation of surplus to maintain a constant and stable rate. Under this policy, therefore, the excessive returns of the earlier years must be set up against the deficiencies of the limited period of extraordinary business conditions due to the war. The Master's view, therefore, is manifestly unsound, i.e.—that since the Commission did not reduce the rates when there were excessive earnings, these became the absolute property of the company, and thereafter it would still be entitled to earn a full return each year and could demand an increase in rates whenever the prospect of deficiencies appeared. This view would render nonsensical the terms of the statute providing for a fair average return on actual investment and requiring the Commission to have consideration for a surplus and contingencies in fixing a reasonable rate. Respondent did, in fact, set up a contingency fund as is hereafter shown, and it was not drawn upon during the aforesaid abnormal period.

Unless the purpose of the Acts was to apply excessive earnings of prosperous years against deficiencies of poorer periods, why did the statute prescribe the duty of allowing a fair average return on actual investment and providing for a surplus and contingencies? Why should there be provision

for surplus and contingencies, unless, in providing for a fair average return, such allowances are to be used when and if needed in the payment of reasonable return when the earnings were insufficient? Could the Legislature have had an idea that a surplus accumulated through excessive earnings should ever be conveyed as an outright gift to the company? Does the statute make sense, unless it is clearly recognized that under any rate the investors are entitled only to a fair average return, and that any excessive earnings for a period are to be accumulated against any subsequent deficiencies.

In the present case, the accumulation of earnings continued for many years. The Commission simply exercised its legal discretion to permit an accumulation rather than to reduce the rates. There is no precise point where a further accumulation must cease and where a consequent reduction in rates must be effected. This is a matter of reason to be exercised under the discretion of the Commission.

Under this long standing policy, therefore, of maintaining the statutory rate in spite of excessive earnings, the rate should be continued until all the previous excesses have been consumed; or even longer unless without any doubt as to the facts the further requirements of service and the equitable treatment of the investors would necessitate an annulment of the rate. But the following statement, which is based upon data in the record, shows that there is still a large balance of unconsumed excessive returns applicable to future deficiencies. The statement presents the amount of a fair return for each year since 1906, the return actually realized under the statutory rate, the excessive return or deficiencies, and the total accumulative excessive return:

TABLE II.

RETURNS ON RATE BASE.
Aug. 1st, 1905—Dec. 31st, 1918.

Year Ended	Operating Income, Plus Book Deprec., M. Cubic Ft. Exh. No. 12.	Allowance at 3c. Per Gas Sold. M. Cu. Ft.	Adjusted Operating Income. M. Cu. Ft.	Rate Base as Shown in Brief of Newton.	Excess or (Deficit) Over Per Cent. Return on Exp., Taxes, Deprec., & 6% Rate Base.		
					*Depreciation	6% Return on Rate Base.	11.48
July 31st, 1900	\$48,955.93	90,477.5	\$2,714.32	\$40,241.61	\$402,711.00	\$24,162.66	\$22,078.95
July 31st, 1907	46,174.23	103,943.5	5,118.30	43,055.93	4,54,253.00	26,055.18	17,000.75
July 31st, 1908	62,739.93	124,059.0	3,748.77	58,991.16	4,07,503.00	30,935.58	12,62
Five Mos., 1908	33,185.72	61,402.7	1,842.08	31,343.64	194,830.40	11,689.82	19,653.82
Dec. 31st, 1909	71,878.38	146,496.9	4,394.91	67,483.47	503,470.00	30,208.20	37,275.27
Dec. 31st, 1910	80,054.07	168,664.8	5,059.94	74,994.13	536,825.00	32,209.50	42,784.63
Dec. 31st, 1911	74,001.08	184,720.9	5,541.63	68,459.45	584,825.25	35,089.52	33,369.93
Dec. 31st, 1912	79,595.17	209,380.1	6,281.40	73,313.77	615,422.25	36,925.33	36,388.44
Dec. 31st, 1913	72,122.15	220,679.3	6,129.38	65,501.77	639,099.25	38,345.96	27,155.81
Dec. 31st, 1914	74,121.09	239,176.8	7,175.30	66,945.79	672,132.25	40,327.93	10,25
Dec. 31st, 1915	83,650.26	239,410.3	7,182.31	76,467.95	751,772.64	45,100.36	9,96
Dec. 31st, 1916	88,453.55	252,310.3	7,569.31	80,884.24	831,867.64	49,912.06	10,17
Dec. 31st, 1917	65,321.97	286,175.9	8,585.28	56,736.69	807,871.90	52,072.31	4,664.38
Dec. 31st, 1918	43,178.13	327,585.6	9,827.57	33,350.56	871,874.90	52,312.49	6,54
							3.83
							\$341,297.26

*Depreciation has been figured consistently at 3c. per M. Cubic Ft. of gas sold. This is the rate at which respondent set aside sums to meet renewals and replacements beginning in the year 1915. That estimate of 3c. exceeds the amount required to meet renewals and replacements as shown by the record.

Note—We have not deducted anything from the book figures of operating expense, not even the Federal Income Tax and Tax on bondholders' income, nor have we taken into account that operating costs were above the reasonable requirement.

From August 1, 1905, to December 31, 1918, based upon the figures in Table II, respondent had thus realized a total of excessive return, under the statutory rate, amounting to \$341,297.26. This excess return should be treated as a prior contribution by the consumers, it being a credit balance to cover temporary annual deficiencies in earnings during abnormal periods. Before the statutory rate, therefore, can be pronounced confiscatory, this entire sum ought first to be wiped out by actual deficiencies, and there is now no prospect that any such amount will be required, in view of the rapidly declining cost of operation, of which this Court can take judicial notice.

While respondent cannot claim that the rate is confiscatory so long as there remains an unconsumed balance of previous excessive earnings, the statutory rate might well be continued for a considerable time, even if all such excesses had been consumed and outright deficits were about to be incurred, provided that there are reasonable prospects of meeting such temporary deficiencies by future earnings and returns.

If the Master's view were to prevail, that the validity of the statutory rate must be judged on the basis of one year, or at most only sixteen months, the reasonable discretion of rate regulation would be unduly restricted. The Court or the Public Service Commission would be bound, under such conditions, to make a new analysis of rates each year, increasing or reducing them according to the costs of the moment, although the changes in expenses might be accidental or temporary, and sound policy would require a stable rate, in spite of the fluctuation in costs. The New York law, therefore, had a purpose not comprehended by the Master,

namely, to provide for the maximum stability in rates, to be maintained with reason.

Further, if the Master's view were sustained, the excessive returns paid by the consumers during prosperous years would be paid over to respondent as its own property. Although they were paid for the purpose of furnishing a fair average return *and to provide a surplus for any temporary deficiencies*, they would be diverted from the latter purpose and the rates would be raised to meet temporary deficiencies. Such a procedure would be rankly unjust to the consumers, requiring them, first, to furnish a surplus to meet possible deficiencies and, second, compelling them to meet the temporary deficiencies by contributing higher rates.

The period selected by Respondent in its Bill of Complaint, 1904 to 1918, inclusive, should be considered in ascertaining if a fair average return has been had on the investment in the property.

The Master stated in his opinion (R. 48 [79^{1/2}]):

"If, therefore, the actual results of operations for the year 1919 show the rate to be confiscatory, it follows that the net result of operations for the year 1920, which can only be determined in definite figures when the year has ended and the books for 1920 have been closed, will show a larger deficiency than appeared as the result of operations in the year 1919. I have therefore concluded to base my findings as to the cost of making and distributing gas especially upon the operations and costs established for the year 1919, those figures being taken, of course, in the light of what I have just said, that the cost of making and distributing gas in the year 1920 will be in excess of

the figures which I reach for the year 1919."
(Italics ours.)

In its bill of complaint, respondent claims (XVI) that "the maximum price of one dollar (\$1.00) per thousand cubic feet for gas, fixed by the said Act of 1906, has been, is, and will continue to be wholly inadequate, in that it does not permit your orator to earn a reasonable return upon the fair value of its property devoted to the public use." Furthermore, it specifically claims (XIV) that during no year since its organization, in 1904, have the earnings been sufficient to provide a return of as much as six per cent. upon the reasonable value of its property; although in paragraph IX thereof it alleges that "since its organization in 1904, it has managed the business prudently but has paid no dividends to its stockholders, has devoted to the development and expansion of the business certain income which might have been used for dividends."

Respondent did not offer a scrap of evidence in support of its claim that the statute has been confiscatory since the organization of the company in 1904. It was practically directed by the Master to confine its testimony to 1919, as appears from the Record:

"The Master—That cross-examination is not at all helpful, I believe, to the determination of this issue. I have got to know what gas oil, in the quantities required by the New York & Queens, could have been bought for in 1919, and what happened in 1912 or 1914, or some other year does not help us.

"Mr. Chambers—We don't agree with you at all about that, and we want to have you take the proof as to other times.

The Master—That does not interest me at all, whether you agree with me or not.

Mr. Chambers—It does the defendants and it may the other court.

“The Master—I am going to direct this trial. I am simply indicating to counsel now what I think is useful to the Master in determining the issues in this case. I am going to sustain objections to any line of inquiry that does not bear upon that situation.

“Mr. Ransom—I have no objection to his stating what the change in price was between—

“The Master—Well, I have. I am not going to lumber up this record—

“Mr. Chambers—The claim in the bill of complaint that they have not enjoyed a fair return since 1906.

“The Master—I don’t care what they say.

“Mr. Chambers—The same issue is raised in the Consolidated—

“The Master—I don’t care what they say in their bill. The question is what, by actual experience, beginning January 1, 1919, is the result to this company at a price limited, as I understand it, to one dollar. I have got to know what it cost to make gas in 1919 and 1920, and as one of the elements I have to know what oil should have cost the New York & Queens during that period. I don’t care what happened years ago.

“Mr. Deegan—You are going to limit your inquiry to the period subsequent to January 1, 1919?

“The Master—Yes.”

(R. 354 [349-50].)

Considering all the circumstances surrounding the statutes and the showing in the record that respondent has enjoyed more than a fair average return upon the capital actually employed, appellants respectfully submit that the judgment of the lower court should be reversed.

III.

For the purpose of making a fair test of the statute, the period selected by the Master is altogether abnormal.

Under any circumstances, one year's operations form no true criterion of the reasonableness of legislation establishing rates for public utility service; but when we find that the year under consideration in this case was in almost every respect abnormal, it becomes manifestly unfair to use that short and unprecedented period as the basis for declaring confiscatory a statute that was held to be constitutional by this Court in 1909. Judicial notice may be taken of the fact that the year 1919 was abnormal, but it is perhaps advisable to prove by the record that the year was one of unprecedentedly high prices; labor conditions were subnormal so far as concerns the number of men available, and abnormal as to the rates paid. The following quotations from the record are very much in point:

"Q. What is the situation? You cannot get anthracite coal under contract at all just now?

"A. No, sir; we cannot. They are not prepared on account of the situation in the mining region on wages; it has not been settled, and no one is prepared to make a price, a definite price for next year, with the exception, I think, of one where we have an offer of 10,000 tons of coal—well, even that is not definite, because that is subject to increase in miners' wages, so there is really no definite price.

"Q. How long has that condition existed

that you have not been able to get a contract?

"A. We have not been able to get quotations prior to the 1st of April. The coal contract year is from April 1st.

"Q. In other words, up to April 1st you had some coal contracts that were running out?

"A. Yes, sir.

"Q. But beginning April 1st you were not able to make any coal contracts at all?

"A. No, sir. And in order to keep running we have been running into our stock of coal which we had on hand. During the month of April, for instance, we have received about 5,000 tons of anthracite coal, and during that period of time our stock of anthracite coal in our various plants has decreased about 30,000 tons.

"Q. Where does the New York & Queens get its anthracite coal from?

"A. The New York & Queens had some stock of coal on hand in the same way as the other plants, and we have a surplus stock of coal at Astoria which is available for the New York & Queens in case of necessity."

(R. 333 [311-2].)

"Q. And you do not know anything about the sources of supply of coal, do you; you have not made any study of that?

"A. Yes, I have been down in the mines.

"Q. You do not want this Court to understand that that is running out, too, do you?

"A. The coal is not running out, but the ability to get it is very difficult at the present time.

"Q. We are in unusual times, then, I take it?

"A. Yes, so far as the strikes are concerned; as they occur they are unusual at the moment.

"Q. So far as everything is concerned, isn't that so?

"A. Well, it is very difficult to get any de-

livery of first class—we are speaking of anthracite coal, I assume?

"Q. Yes.

"A. In the first place the labor situation in the mines is not settled; in the next place the strike on the railroad is retarding the delivery of the coal, and in the next place the strike of the harbor tugs of the railroad is making it so that they do not deliver any coal. I believe they delivered one boat yesterday, the first one in, I guess, thirty or forty days. We are compelled to get outside tugs to go down and bring coal up from the terminals, which ordinarily would be delivered by the railroad.

"Q. Labor is on the warpath, would you say?

"A. Well, I think labor is unsettled. I do not know that it is on the warpath.

"Q. You would say that the times are abnormal now?

"A. The labor situation is very much disturbed, there is no question about that.

"Q. You do not want to use the word "abnormal"?

A. Well, I went through a similar experience in 1902 and 1903 with respect to coal, which was practically identical in that time, and other companies had to—I did not in my case, because I got frightened in time to fill up all my coal sheds with coal, and I got through that time without going abroad for coal, but other companies had to go abroad for coal.

"Q. You looked ahead a little bit at that time?

"A. Looked ahead at that time? Yes, I looked ahead at that time.

"Q. And you bridged over the gap?

"A. In that particular case of the Boston Company I succeeded in bridging that over.

"Q. Now, would you not say that conditions were abnormal all around?

"Mr. Ransom—I object to that as vague in meaning and indefinite. What does he mean by abnormal, the attitude of the Attorney General, or what?

"The Master—I will let Mr. Addicks say.

"Mr. Chambers—No, I refer to the Consolidated Company.

"The Master—I did not ask you to refer to anything; I have ruled on it.

"Mr. Chambers—Well, I have the attorney in mind, for one thing.

"A. I do not know of any time in my experience where it was so difficult to get coal, either hard or soft, and either coal or gas oil, and that situation being more acute than I have ever seen it, I should call that abnormal. As to when it is going to straighten out, why, everything is very uncertain.

"Mr. Hyatt—You are only testifying for yourself, are you not, Mr. Addicks, you do not mean to testify for others?

"Mr. Ransom—I object to the interruption by this self-constituted representative of the District Attorney.

"The Master—Objection sustained.

Mr. Hyatt—Exception.

"Q. You would not say that was so only as to coal, you do not have that in mind; that condition prevails generally, does it not?

"A. I think the same thing applies to oil.

"Q. Does it apply to labor and materials that you use?

"A. Labor is very, very uncertain.

"Q. It applies to everything, does it not—food and everything else?

"Mr. Ransom—What applies?

"Mr. Chambers—This abnormal and uncertain period.

"Mr. Ransom—There is nothing abnormal about it.

"A. I think there is a great deal of unrest with labor, a great deal of uncertainty. No

one knows what the rate of pay of a man is going to be from one day to another.

"Q. If you were writing some friend of yours, and if you were discussing the times, would you not say that the times were abnormal all around?

"Mr. Ransom—Objected to as an effort to make the case ridiculous.

"Mr. Chambers—Leaving out counsel for the complainant.

"Mr. Ransom—It is not a form of question that will look intelligible on any record.

"The Master—I will allow it, anyhow.

"A. I shall have to ask you to repeat it.

"Q. (Repeated by the stenographer.)

"Mr. Ransom—I object on the further ground that it is calculated to bring the constitutional law officer of the State into contempt.

"The Master—Objection overruled.

"A. I think I should be very apt to express myself as I have just expressed myself. I do not know how I could do it more completely."

(R. 372-4 [380-3].)

"Q. How much was that a year ago, say, or two years ago, that cost?

"A. I don't know. I can recall some three or four or five years ago, it was I think fifty cents.

"Q. In place of what, a dollar and a quarter?

"A. Yes. That is just an illustration, Mr. Chambers, of how things have gone up all along the line.

"Q. Well, things are abnormal. That proves it, doesn't it?

"A. Well, is it a question of what may be considered abnormal. It looks now as if we had normal conditions, unless it goes higher.

"Q. Suppose it goes lower?

"A. If it goes lower, it will be lower.

"Q. Well, it is an unusual situation, isn't it?

"A. Well, the situation has been unusual for the last three or four years; based upon three or four years ago it is very unusual, from 1914, but whether you call it an unusual situation now is another proposition because it has become a usual condition with us."

(R. 433 [485]).

"A. There were no contracts made during that period, because the Government had charge of the coal supply.

"The Master—Because who had charge of the coal supply?

"The Witness—The Government.

"Mr. Neumann—One moment. I move to strike out that part of the witness' answer 'because the Government had control of the coal supply.'

"The Master—Motion denied.

"Mr. Neumann—Exception.

"Q. By the Government, you mean the United States Fuel Administration?

"A. I do.

"Mr. Neumann—Same objection.

"The Master—Same ruling.

"Mr. Neuman—Exception.

"Q. So that coal secured by the New York & Queens Gas Company during January, February and March of 1919 was not pursuant to any contracts with the coal companies?

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial, and nothing yet shown with reference to the New York & Queens, no foundation laid for it.

"The Master—Overruled.

"Mr. Neumann—Exception.

"Mr. Tobin—I ask, if the Master please, the

date—I cannot just recall the date that Mr. Gawtry left the company.

"The Master—March 1, 1920.

"A. What was the question?

(Question repeated by the stenographer.)

"A. That is correct.

"Q. Did you ordinarily purchase your coal through jobbers or deal directly with the coal companies?

"Mr. Neumann—That is objected to on the ground it is incompetent, irrelevant and immaterial, and not the proper way of proving a custom or practice.

"The Master—Overruled.

"Mr. Neumann—Exception.

"A. Direct from the coal companies, the parent companies.

"Q. That is, as wholesalers?

"A. As wholesalers.

"Mr. Neumann—I move to strike that answer out, because I do not think that means anything, 'wholesalers.'

"The Master—Motion denied.

"Mr. Neumann—Exception.

"Mr. Tobin—Exception.

"Q. During the coal year beginning April 1, 1919, were you in fact able to get all the coal that you required from producers?

"Mr. Neumann—That is objected to on the ground that it is incompetent, irrelevant and immaterial, and not the proper way of proving it. It is a conclusion of this witness. He may state what he did, and from that the Master must determine whether they were able to get coal or not.

"The Master—I think there is a good deal of force in that objection. I will sustain it.

"Mr. Ransom—It is your feeling that the question calls for a conclusion?

"The Master—Yes.



9

"Q. During that coal year what did you do to get coal?

"A. We tried in every possible way. We had to go to Washington frequently, to Philadelphia, to the railroad officials of the different roads on which coal is shipped, to the Coal Administration, Mr. Garfield—every possible way.

"Mr. Neumann—I move to strike from that answer the words 'possible way.'

"The Master—Overruled.

"Mr. Neumann—Exception.

"Q. Mr. Garfield was the director of the United States Fuel Administration during that time?

"A. He was.

"Q. Did you get all your coal from producers, or did you have to get it from other sources?

"Mr. Neumann—Objected to on the ground it is incompetent, irrelevant and immaterial, vague and indefinite.

"The Master—Overruled.

"Mr. Neumann—Exception.

"A. We got most of it from producers; we got some from brokers.

"Q. During the coal year beginning April 1, 1918, were the prices for anthracite coal fixed by agreement between yourselves and coal companies, or were they fixed otherwise?

"Mr. Neumann—That is objected to on the ground it is incompetent, irrelevant and immaterial, and not the proper way of proving it.

"The Master—Overruled.

"Mr. Neumann—Exception.

"A. 1918 that is?

"Q. Yes, during the coal year beginning April, 1918?

"A. Fixed by the United States Government.

"Q. The Fuel Administration?

"A. The Fuel Administration.

"Q. Were railroad and other charges likewise fixed by the Government?

"Mr. Neumann—Same objection.

"The Master—Overruled.

"Mr. Neumann—Exception.

"A. They were.

"Mr. Neumann—if the Court pleases, if the Government fixed these prices there must have been some order of some kind, and that would be the best proof of it.

"The Master—Yes, but this proof is good enough.

"Mr. Neumann—I except, your Honor."

(R. 527-9 [645-8].)

"Now, Mr. Gawtry, within the last few months there have been strikes at the coal mines, have there not?"

"Mr. Ransom—I object to the question unless limited to anthracite.

"The Master—Objection overruled.

"A. Not that I know of.

"Well, for how far a period back do you recall a strike at the mines.

"A. Anthracite mines, you refer to?

"Q. Yes.

"A. Some period; there has been a cessation of work.

"Q. Well, there has been a cessation of work only.

"A. (Interrupting) Prior to the 1st of April.

"Q. Prior to April 1, 1920?

"A. Right.

"Q. How far back did that run?

"A. Just about the 1st of April, that is when their agreement ran out, the last day or so, about the end of March they ceased and did not work in the early part of April and the

last few days at the end of March and the 1st of April.

"Q. Are they working now?

"A. To a certain extent.

"Q. But not to their capacity?

"A. No.

"Q. At the present time there is considerable railroad congestion, is there not?

"A. Yes.

"Q. You read the announcement about the railroads asking the Government to take control again and issue priority orders?

"A. I have.

"Q. And both of those conditions would tend to affect the price of coal, wouldn't they?

"A. They would."

(R. 518 [680].)

"By the Master:

"Q. Do you carry anybody on that payroll that is not actually employed?

"A. Absolutely not.

"Q. Do you carry any amount in there that is not actually paid?

"A. No, sir.

"Q. Do you carry any man that you don't need?

"A. We can't get all we need."

(R. 599-600 [818-9].)

"The Master—How about coal? Would you say it was poorer today than it was two or three years ago?

"The Witness—No, because during the war period we got some cargoes that were very poor. We even had to go to the Shipping Board to get some coal, and some of it was awful. It is hard to form a comparison.

"Q. On the coal you cannot say, but on the oil you are satisfied that it is not running quite so good. Can you give us any degree

of less quality in 1920 as against 1917 or 1916?

"A. No, I cannot.

"Q. You have not formed any judgment on that?

"A. No.

(R. 639-40 [914].)

"The Witness—There are conditions which sometimes turn up in a small works like ours, where we have trouble in getting labor. I have seen conditions there when Mr. Morrison has had to go in and make gas because the gas-maker has not shown up in the morning, and we were short of help. If that condition existed around the first of the month, he would not take his inventory."

(R. 683 [988].)

"Q. What factors do you take into consideration when you give such an order?

"A. I get the works report about the second or third of the month; I go over those figures and then I go back over several days' use of coal for the previous month, and estimate about how long the coal on hand will last, and if we have plenty of room and coal is coming in easy, I order more, so as to keep our bins pretty well filled. Sometimes I have to get down pretty low on coal, because it is pretty hard to get at times.

"Q. When do you find coal harder to get, in the summer or in the winter?

"A. In the winter time, where there is much ice in Flushing Creek and Flushing Bay.

"Q. No, I am talking about from the company, irrespective of climatic conditions.

"A. I would say right now it is the hardest time I have ever known to get coal."

(R. 684 [991].)

"Q. Yes, you testified you had storage capacity for 2,000 tons.

"A. Yes, that is only three barges.

"Q. Yes, that would be three barges; assuming your pile went down to 300 tons you could order two barges and have them delivered, could you not; there would be no obstacle in the way of that, would there?"

"A. Well, the only obstacle would be the impossibility of getting it.

"Q. Impossibility of what?

"A. Of coal getting into tidewater. For instance, only last month we would not get any coal from tidewater, and we had to get coal from Astoria to keep going.

"Q. Why?

"A. Because our stock was getting too low.

"Q. Why could you not get it from tide-water?

"A. Because there was none coming in."

(R. 685 [993].)

Public Service Commissions have generally held that the stockholders of public utilities are not to be relieved, or at least wholly relieved, from the losses and burdens resulting from the war or the immediate period of adjustment or reconstruction immediately following.

In re West Virginia Traction & Electric Co. (W. V. reported P. U. R. 1919 E. 95) it was held that the increased operating expenses of a utility due to war conditions, should not be transferred to its patrons.

In re Tri-State Telephone & Telegraph Co. (P. U. R. 1919 C. 5), it was held that corporations as well as individuals must bear their share of the burdens of the war, and sustain some loss of income without flinching.

In re Hammond Water Works (P. U. R. 1919 A. 180), the Indiana Commission refused to base permanent rates upon existing abnormal conditions, because of the impossibility of forecasting

operating expenses and revenues with certainty.

In re *Home Telephone Co.* (Va. P. U. R. 1919 A. 243), it was held that a prosperous utility which has created a large surplus out of earnings, is not entitled to increase its rates on a mere showing of increased cost of operation due to war conditions.

In re *Salt Lake & U. R. Co.* (Utah P. U. R. 1919 C. 565). The Commission declared, in effect, that it would seem to be the part of wisdom to permit utilities to bear temporarily, during the period of reconstruction, such share of the public burden as they can carry without too seriously affecting their financial stability.

In re *Pacific Power & Light Co.*, P. U. R., 1918, at page 670, the Commission said:

"We are living in unusual times. All are called upon to forego many pre-war privileges and luxuries, and the Commission believes that stockholders of the company should bear a portion of the increased burdens incident to war."

The New Jersey Board of Public Utility Commissioners held (P. U. R., 1918, Vol. E, p. 915):

"During the war period and in accordance with national and state war policies while in underwriting normal returns for public utilities we should allow rates sufficient to keep the utility solvent and in good operating condition, we must also continue our declared policy of disallowing rates in war times for the purpose of increasing dividends. Stockholders in such corporations must share in the burdens and hardships resulting from financial changes due to the war and cannot expect to wholly escape therefrom."

Similar expressions by Commissions may be found in

- (1) The Indiana Public Service Commis-

in "In re Union City Telephone Company, P. U. R., 1918, E., p. 669;

(2) New York Public Service Commission in Long Island Railway Co., 1918, P. U. R. 651;

(3) The Utah Public Service Commission, P. U. R., 1918, B., 497;

(4) The West Virginia Commission in Re Winifrede R. Co., P. U. R., 1918, C., 156;

(5) The California Railroad Commission in Re Northern California Power Co., P. U. R., 1918, C., 394.

The courts before the World War held generally in the same direction:

In *Stevenson v. Great Northern Ry. Co.*, 72 N. W. Rep., pp. 713, 721, the Court said:

"There is no constitutional principle which guarantees the capital invested in railroads, immunity from business vicissitudes to which capital invested in all other enterprises is subject. * * * The courts should take notice of the general depression in business prevailing in 1894."

In *Matthews v. Board of Corporation Commissioners*, 106 Fed. Rep., 9, the Court said:

"It is said however, that the net profits of the good years should be appropriated to make good the losses of the bad years, but it must be remembered that these bad years from 1891 to 1895 were years of panic and general depression. All investments of every character suffered. *The grant of a charter to a railroad company does not guarantee that it will or can make the investment at all times a paying one. A corporation is not entitled as of right and without reference to the necessities of the public to realize a given per cent. on its capital stock* (Turnpike v. Banford, 164 U. S., 578)."

That there has been a recession from the abnormally high prices caused by the Great War, suf-

ficient in extent to justify the denial of applications by public utility corporations for increases in rates, is evident from recent decisions by Public Service Commissions throughout the country.

The Maryland Public Service Commission said:

"The Commission fully realizes that in view of the numerous reductions in prices which have occurred in the last few months, the time is not opportune for any increase in rates."

Re Consolidated Gas, Elec. Light & Power Co., P. U. R. 1921, A-649.

The Illinois Public Utilities Commission said:

"It is clear that the inevitable re-action from war prices is already under way in this country *and the signs of financial depression now so prevalent about us cannot be ignored.* While thus far, lighting materials have been practically unaffected by the tendency of lower prices, it must be evident to even the casual investigators that industrial depression must effectively operate to reduce the price of oil, coal and other materials essential to the production of gas, electricity and other utility services. It now is a matter of daily testimony before the commission that labor has increased in efficiency within the past few months.

"Therefore, in order to protect the interests of the utilities, and the consumers of their services, it is important that advances of rates in the face of adverse economic conditions shall be made with circumspection lest undue hardship be worked upon the public."

Re Freeport Gas Co., P. U. R. 1921, A-687.

In a more recent case, the Illinois Public Utilities Commission in re Metropolitan, West Side Elev. R. Co., P. U. R., 1921 B, p. 293 (opinion, January 4, 1921) said:

"Further, it must be manifest that our nation is now upon the threshold of important economic readjustments *which will hasten the return to normal industrial conditions. The trend towards lower prices is too pronounced to be ignored, and its effect may properly be taken into account by us in the instant case as it has been in the recent past.*"

The New York Public Service Commission, Second District, said:

"It is quite apparent now that these prices experienced by this petitioner were abnormal, and also that they were temporary. *The peak has been passed and repairs are already in progress.* It appeared from the evidence of the witnesses called in this case that in the Hudson Valley the price prevailing not long ago for bituminous coal of \$9 at the mines shrunk slightly prior to the hearing held in November to \$5. This emphasizes the fact which follows, not only from the evidence in this case, but from general conditions known to this Commission, of which we should take notice, that the exceedingly high prices lately experienced are transitory. They form no safe basis for rate making in an attempt to compute a reasonable return for the future. On the other hand, it would be equally unjust to have recourse to pre-war prices or to conditions which formerly maintained in this industry, because there is no reasonable assurance that they would be restored within any short period of time."

Re Kingston Gas & Elec. Co. P. U. R.,
1921, B. 76, 82, 83.

As to the meaning, a fair average return, the reports of the public utility commissions abound with decisions to the effect that these words are to be broadly construed in the public interest without damage to the companies.

In re Queens Borough Gas & E. Co. (P. U. R., 1918, F. 891).

"Before the company demands 'emergency' increase in its present rates, *it should 'level off,' average and absorb its excessive earnings and reserves of recent years.* The 'fat' of those past years must serve, in the first instance, to carry it through the 'lean' years of the uncertain present. Sums unwarrantedly taken from operating revenues, and paid out as dividends on over capitalization or *put into property* with only a nominal book entry as 'reserves,' should first be utilized in meeting the charges of the emergency period, before demand is made for higher rates and larger revenues. This company has no right or reason to claim that it is confronted with any real extremity or 'emergency.'"

In re Jefferson City Light, Heat and Power Co., the Missouri Public Service Commission, in P. U. R., 1919, A., at page 722, said:

"According to Section 82 of the Missouri Public Service Commission law the Commission is empowered to fix maximum rates for electricity, 'with due regard, among other things, to a reasonable *average* return upon capital actually expended.' Italics above are ours. *We construe this to mean an average for a series of years.*

"The evidence in this case fails to demonstrate that an increase in rates is required in order to enable the petitioner to secure a reasonable average return, taking into consideration the earnings during the past four years."

In Smyth vs. Ames, 169 U. S., at page 546, the Court said:

"The utmost that any corporation, operating a public highway, can rightfully demand

at the hands of the Legislature when exerting its general powers, is that it receive, what, *under all the circumstances*, is such compensation for the use of its property as will be just both to it and to the public."

In *Kings County Lighting Co. vs. Lewis*, 110 Misc., at page 242, Justice Greenbaum said:

"It is clear that confiscation may not be predicated upon the operations of the plaintiff for 1916 and 1917. As to the years 1917 and 1918 it must at the outset be said that those years were abnormal, owing to the war conditions then existing."

IV.

Respondent failed to prove the fair present value or the investment in the property devoted to public use.

Ultimately, in every case affecting the rate for public utility service, the question to be determined is: What is a fair and reasonable return upon the fair value of the property employed in rendering service to the public?

In arriving at the present value of this class of property, courts and commissions take into consideration the cost to reproduce, the original cost, the investment, the present value, overhead expense and other elements of intangible value that have been enumerated in the many cases decided by this Court.

In order for the Court to reach its opinion on the fair value of respondent's property, the rate base on which it is entitled to a reasonable return,

it must have before it competent evidence of the original cost of the property; the cost to reproduce it new under normal market conditions; the present condition as compared with the property new; and a record of the operating costs from which it may be determined whether or not the plant is functioning properly and permitting the utility corporation to serve the public at a reasonable cost. A public utility is entitled to ask a fair return upon the value of that which it employs for the public convenience; but, on the other hand, the public is entitled to demand that no more be exacted from it than the services rendered are reasonably worth.

(*Smyth v. Ames*, 169 U. S., 466, 48 Sup. Ct., 418; *San Diego Land and Town Co. v. National City*, 174 U. S., 739, 19 Sup. Ct., 804; *San Diego Land and Town Co. v. Jasper*, 189 U. S., 439, 23 Sup. Ct., 571; *Stanislaus County v. San Joaquin and King's River Canal and Irrigation Co.*, 192 U. S., 201, 21 Sup. Ct., 241; *Chicago Union Traction Co. v. City of Chicago*, 199 Ill., 579.)

In the bill of complaint, respondent claims that the reasonable value of the property devoted to the gas business as of December 31, 1918, including additions made during the year, is not less than \$1,492,976; and that the cost of reproducing the said property during the year 1918 would greatly exceed that amount. In addition, respondent claims that it possesses "going-value" and other intangible assets of great value; and that there existed at that time an aggregate deficiency

in earnings below $7\frac{1}{2}\%$ upon the value of the said property devoted to the gas business, in the sum of at least \$300,858.41, not including compound interest on the deficits at the rate of 6% per annum (R-3).

In the Master's report it is stated:

"Fortunately, there has been agreement between the parties upon this record as to the cost, up to and as of August 1, 1904, of the tangible properties still in existence and use, which were acquired by the complainant company on that date. The complainant and the defendants agree that the tangible property acquired on August 1, 1904, and still in existence and use, did cost, and as of that date was reasonably worth, at least, \$280,108, and I accept that figure in arriving at the complainant's total investment and the present value of its property. Since that date, the net additions to the plant and property of the complainant have cost \$850,389.08, and there is no dispute as to this item. These two items not in controversy cover the actual cost of the tangible property now in use, aggregating \$1,130,497.08.

"Additional Elements of the Original Investment."

"To the first of these items, the complainant asks me, on the basis of Mr. Miller's testimony and the book entries as of 1904 and subsequent years, to add \$320,350 for the preliminary organization and development expenses of the enterprise and other items of cost set forth in Mr. Miller's estimate (Complainant's Exhibit 96). It is conceded by the defendants that in the initiating of a gas enterprise there is necessarily incurred preliminary and development expenses, cost of financing, engineering and superintendence expenses, interest and taxes during construction,

and the like as to which varying amounts were testified by the witnesses on each side, principally based upon opinions as to the proper percentages to be allowed for such items. The defendants contend, moreover, that there is no adequate proof before me on which I should base any finding of value for the franchises and rights."

(R-54 [89].)

It will be seen from the above that the Master confuses cost with value because he takes the sum of \$280,108, *the agreed upon cost of property installed prior to August 1, 1904, and accepts that figure as the present value of said property*, thus ignoring the inevitable depreciation that has accrued since that part of the property was built which existed when respondent took it over in 1904.

We propose to devote several pages of this brief to a discussion of the reproduction cost theory on which respondent relies in setting up what it conceives to be the value of its property on which a fair return should be had. We do not for one moment believe this Court will decide the case on any such theory of value, but we feel compelled to lay the facts in the record before the Court for the reason that the Master failed to deduct from his finding of so-called original cost any sum representing the depreciation that has taken place in this property. He relied upon his opinion that the physical or functional depreciation that exists has been offset by theoretical appreciation. He arrived at his estimate of appreciation by accepting the reproduction cost figures of the expert witness Miller, which figures represent Miller's opinion of the prices that prevailed January 1, 1920.

The attitude of respondent in submitting its case is shown by the following:

"Mr. Ransom—The complainant, as already stated, is offering proof along the lines which it started to do with respect to the value of this property for rate purposes. Judge Mayer has said that, if we expect to offer proof of original cost as a part of our case, we shall furnish it. We do not expect to offer proof of original cost as part of our case any more than we did in the Consolidated Case.

"The Master—Yes, you did in the Consolidated Case.

"Mr. Ransom—We did in rebuttal.

"The Master—What?

"Mr. Ransom—We did in rebuttal.

"Mr. Neumann—Do you think we are going to take the burden of proof?

"The Master—Wait a minute; let us understand this right now, Judge, and we will not be misled. If you rest your case here, without any evidence at all as to what you invested in these properties, I will dismiss the complaint.

"Mr. Ransom—I do not think you could.

"The Master—Then I will refuse to take any more proof.

"Mr. Neumann—That is his position.

"Mr. Ransom—if we show, as we shall, that the cost of making and distributing gas alone, without any return on any investment, is substantially more than the statutory rate—

"The Master—I guess that is a complete answer, of course, but if I find there is even four cents—

"Mr. Chambers—They admit 2½ per cent, they make. Have you seen that complaint?

"Mr. Ransom—Well, in 1918.

"The Master—But in the Consolidated Gas

case you had proof that you issued \$38,000,000 worth of capital for property. That you got right away, the first thing you got in your case. There was proof, and I said at the start I would hold that to be evidence of some cost to the Consolidated.

"Mr. Ransom—We have even better proof in this case without offering either proof of original cost or proof of reproduction costs, which we will offer.

"Mr. Chambers—They say they are making 2½ per cent.

"Mr. Ransom—Why not be fair? We said in 1918.

"Mr. Chambers—Well, that is the only time you speak of.

"The Master—My only purpose here and in the Consolidated Case was to give you the way my mind is running.

"Mr. Ransom—I am very glad to have it.

"The Master—And you take your chances.

"Mr. Ransom—I shall."

(R-193-194 [76-77].)

Notwithstanding that respondent relied upon its ability to prove that the revenue received fell short of meeting the operating expenses for the year 1919, it offered testimony in an effort to prove the cost of reproducing the property according to an inventory which had applied to the items therein, by the witness Miller, unit prices as of January 1, 1920. (R-252 [176].)

Appellants contend that inasmuch as the complaint was filed April 7, 1919, and the Master made his findings, based upon the result of operations for the year 1919, any evidence of cost to reproduce the property now, as of January, 1920, is not entitled to any consideration.

Appellants further contend that there is no competent evidence before the court as to the actual amount of property owned by the respondent, used

and useful in serving the public. The Master stated (R-255):

"I am not going to take Mr. Miller's value until I get more proof of what actual property they have on hand."

As to lack of fairness in accepting reproduction cost during the period of abnormal prices, as an indication of the fair value of the property, the Master stated his views during the trial as follows:

"The Master—I am frank to say in this connection, and in connection with this inventory, that I do not believe the Court ever intended by any statement made in any case to require the consumers of gas to pay a price based upon a theoretical or opinion statement as to the cost of replacing the plant today. Now, it may be that I have got to value the plant as of this time under some of the language of the cases, but having in mind an expression in the decision or opinion of the Supreme Court in the prior Consolidated case, I do not believe the Court ever intended that the consumers should pay for gas based upon the present, and to some extent, in one point of view, an abnormally high price of reproducing this kind of property. I am going to take all this evidence.

"Mr. Neumann—Your Honor means a return based on that valuation?

"The Master—I say a return based on that. It may well be that I have got to make some finding as to present cost of replacing or reproducing, and therefore I am going to take this proof, but I am frank to say I do not believe the Court ever intended to impose any such condition on the consumer."

(R-260 [190].)

The Master's reference to this Court's decision in the "Consolidated Case" was apparently the following:

"If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the Company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it where the property may have so increased tremendously in value as to render a rate permitting a reasonable return upon such value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily be presented."

Wilcox v. Consolidated Gas Co., 212 U. S. 52.

The Public Service Commission Law under which respondent operates, provides, Section 72, as follows:

"In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a *reasonable average return* upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

Whitten, a writer on public utility questions, cited with approval by this Court, says, in his "Valuation of Public Service Corporations," Vol. II, page 17,

"In recent years there has been a tendency to modify the reproduction method so as to bring it nearer to actual cost and to emphasize the importance of the actual necessary cost as a factor in determining value. Certain decisions go so far as to make the actual and necessary cost the most important, if not the controlling, factor in determining fair value."

And at page 827, he says:

"Any method that is pre-eminently fair to both parties (meaning to the public and the public utility company), must get back to actual capital cost as a base for actual as distinct from nominal profits."

In *San Diego Water Co. v. City of San Diego*, 118 Cal., 556; 50 Pac., 633, 636, 638, the California Supreme Court says:

"Nor would it, on the other hand, be just to the consumers to require them to pay an enhanced price for the water, on the ground that it would now cost more to construct similar works. Such a contingency may well happen; but to allow an increase of rates for such reason would be to allow the water company to make a profit, not as a reward for its expenditures and services, but for the fortuitous occurrence of a rise in the price of materials or labor. The law does not intend that this business shall be a speculation in which the water company or the consumers shall respectively win or lost upon the casting of a die, or upon the equally unpredictable fluctuations of the markets. For the money which the company has expended for the public benefit, it is to receive a reasonable, and no more than a reasonable, reward. It is to be paid according to what it has done and not according to what others might conceivably do. In effect, the bargain between the company and the public was made when the

works were constructed; and this matter is to be determined according to the state of things at that time. * * *

In *Brymer v. Butler Water Co.*, 179 Pa., 231; 36 Atl., 249, 251, the Pennsylvania Supreme Court says that:

"Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment."

And, commenting on the preceding decision, another Pennsylvania judicial tribunal, in *Wilkes-Barre v. Spring Brook Water Co.*, 4 *Lack. (Pa.) Leg. News.*, 367, 380, says:

"It may be contended that the rule adopted by our Supreme Court is somewhat arbitrary. But we know of no better one. The primary basis of any calculator as to the value of a water plant must be the money actually invested by the owners."

In *Public Utility Commission ex rel. City of Springfield, the Springfield Gas and Electric Company*, 291 Ill., 209, the Illinois Supreme Court says,

"It would be equally as unfair to the consumer to fix the rate at a figure which would produce a reasonable income on a value determined by the cost of reproduction new at a time when cost of construction was abnormally inflated, as it would be unfair to the public utility to compel it to serve the public for a rate that would produce a reasonable income on a value determined by cost of reproduction new at a time when the cost of construction was abnormally low. Therefore it cannot be laid down as a rule without qualifications that cost of reproduction new, less depreciation, is the only basis of valuation for rate-making purposes. It is equally true that

the original cost of construction, less depreciation, cannot be held to be the only proper basis for determination of valuation for rate-making purposes. As we have pointed out heretofore in this opinion, the weight of authority is that every element having any bearing on the situation must be considered in the investigation and then sound business judgment applied to the determination of a valuation that is fair and just to the consumer and the utility. Each case must be considered in the investigation and then sound business judgment applied to the determination of a valuation that is fair and just to the consumer and the utility. Each case must be considered on its own merits and such result of value arrived at as may be just and right in each case. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. We consider any value a fair value which fair and reasonable men would say ought to be attached to the property, under all the circumstances of the particular case, for the purpose of measuring a return which the public should pay to the owner."

and, later in the opinion,

"In rate cases the question in determining the value is not how much has been or can be got out of the property, but how much has been put into it, in order that from that fact it may be determined how much may be reasonably taken out of it in the way of net income."

The fundamental fallacy of using reproduction cost as an evidence of value lies in the fact that it is an endeavor to ascertain an *exchange value* for a property which admittedly has *no exchange value* as a whole. The effort is made by professional witnesses, in giving opinion testimony, to add to-

gether the assumed exchange values of all the individual items of the property and then claim that the resultant figure, which cannot possibly be the exchange value of the property under any conceivable competitive conditions of barter and sale, is, nevertheless, the fair value of the property to a monopoly upon which it is entitled to earn a return such as it could not possibly earn if subjected to the free play of competition.

The greatest weakness in the use of the reproduction cost estimate in determining fair value is to decide upon the price period upon which reproduction cost is to be figured. The witness Miller dodged this difficulty by taking prices as of January 1, 1920. *He takes spot prices of that date although it is clear such prices do not represent the price levels of the next year or two any more than they do of the past year or two.* He does not follow the practice promulgated by many experts who attempt to ascertain price levels over a sufficiently prolonged period in order to determine the normal prices. He ignores the fact that January 1, 1920, was an utterly abnormal time in relation to commodity prices of construction, materials and labor.

It is evident that the estimated reproduction cost of the *identical plant* at prices as of January 1, 1920, necessarily exceeds the exchange value or possible selling price of the existing plant because that plant was built over a long series of years and the existing depreciation must be deducted from such a reproduction cost to make the evidence even remotely available for determining value. In the instant case no witness was called for respondent to show the extent of the accrued depreciation in this very old gas plant, although

Miller gave his opinion as to the amount of money that it would be necessary to spend on the plant to put it in a proper state of repair.

Another weakness of reproduction cost, strikingly evidenced in the testimony of Miller, is that it includes an estimate of the cost of all capital items regardless of whether they were contributed by the investors or by the consumers. For example, although the items of overhead expense, represented in the cost of developing respondent's plant and business, have been carried in operating expenses and were thus paid by the consumers, nevertheless, in reproducing a theoretical plant Miller includes enormous sums representing his opinion as to the value of overhead expenses in his estimate of reproduction cost new. There is not one scrap of evidence to show that his estimates of theoretical overhead expenses represent a value contributed by and owned by the investor.

Still another objection to theoretical reproduction cost is that in itself it has no relationship to actuality. It is based on the assumption of conditions that do not exist and never can exist. The result of utilizing it is to give the same exchange value to a losing and inefficient plant as would be given to a profitable and efficient plant. No such value is recognized by economists or practical business men, and no such value can exist unless it is artificially created by governmental bodies authorizing rates to be charged upon this fictitious basis of valuing the property.

Miller's reproducing cost estimate is subject to the criticism expressed by this court in the Minnesota rate cases in the following language:

"Moreover it is manifest that an attempt to estimate what would be the actual cost of

acquiring the right of way if the railroad were not there is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry and trade; communities have long been dependent on its service and their growth and development have been conditioned on the facilities it has provided. The uses of property in the communities which it serves are to a large degree determined by it. The values of property along its line largely depend on it for its existence. It is an integral part of the communal life. The assumption of its non-existence and at the same time that the values that rest upon it remain unchanged is impossible and cannot be entertained. The conditions of ownership of the property and the amounts which have to be paid in acquiring the right of way supposing the railroad to be removed are wholly beyond reach of any process of rational determination. The cost-of-reproduction method is of service in ascertaining the present value of the plant when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty, but it does not justify the acceptance of results which depend on mere conjecture."

Simpson v. Shepard, 230 U. S., 352.

It is evident that, as an estimate of cost, Miller's figures are wholly theoretical because no one would build an identical plant but would locate one on the waterfront and make it of a design suitable for making gas in the most economical way. No one can conceive of any gas company in 1919, when gas oil was almost unobtainable, building a plant which could not operate unless it secured large quantities of gas oil. Would not any gas company, building a new plant at that time, take into consideration the enormous selling price of the

residual coke that is obtained in the production of coal gas? Would not any gas company, building a plant in 1919, have utilized as a part of its plant the coal gas system for producing generator fuel for use in the water gas units that would comprise the remaining part of any well designed plant?

We have attempted to demonstrate, in later pages of this brief, that the sum required in meeting operating expenses of the present plant is in excess of the sum required to meet operating expenses in a modern, efficient gas plant. The probable earning capacity of this plant is far less than that of a modern and efficient plant; and, if one seeks to establish by the reproduction cost estimate an exchange or competitive value, the plant with the high operating expense is worth much less than a modern plant which can be efficiently operated. In other words, of the two, the plant with the high production cost must have a low earning capacity and necessarily a lower value than the modern plant, accepting the everyday meaning of the word "value."

Perhaps no better condemnation can be found of the reproduction cost method of estimating value than the decision of the Hon. Charles E. Hughes, as referee, in the case of Brooklyn Borough Gas Company *v.* Public Service Commission, et al.

"While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it cannot be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances. *To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the*

public, and likewise to base rates upon an estimated cost of reproduction far lower than the actual *bona fide* and prudent investment because of abnormally low prices would be unfair to the company. * * * A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed and the question is as to the compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduction under abnormal condition. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment but upon a normal reproduction cost in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law. The enforcement of a constitutional guaranty does not require the application of any artificial formula. It has constantly been pointed out that the rate base must be what is called 'the fair value of the property' and that as to this there must be a reasonable judgment based on a proper consideration of all relevant facts [citing *Smyth v. Ames* and other cases]. As was said by the Court of Appeals in the case last cited: 'The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason.' * * * " [Italics ours.]

Brooklyn Borough Gas Co. v. Public Service Com., 17 N. Y. State Dept. Reprs., 81.

The Interstate Commerce Commission, *in re Advances in Rates, Western Case* (20 I. C. C., 307, 317), said as to value for rate purposes:

"The trend of the highest judicial opinion would indicate that we should accept neither the cost of reproduction * * * nor the capitalization, * * * nor the prices of stocks and bonds in the market, nor yet the original investment alone, as the test of present value for purposes of rate regulation. Perhaps the nearest approximation to the fair standard is that of *bona fide investment*—the sacrifice made by the owners of the property—considering as part of the investment any shortage of return that there may be in the early years of the enterprise. Upon this, taking the life history of the road through a number of years, its promoters are entitled to a reasonable return. This, however, manifestly is limited; for a return should not be given upon wastefulness, mismanagement, or poor judgment, and always there is present the restriction that no more than a reasonable rate shall be charged."

Even if the theory of the witness Miller is considered of use in arriving at an estimate of the fair value of the property, his figures should be thrown out by reason of the fact that he did not take into account the present condition of the property as compared with a new property. As an indication of his views and the Master's opinion regarding depreciation, we refer to the record as follows:

"Q. It is your idea that machinery does not wear out, is it?

"A. No.

"Q. It does wear out?

"A. Yes.

"Q. Automobiles wear out?

"A. Surely.

"Q. And boilers wear out?

"A. Surely.

"Q. Everything wears out?

"A. If not properly maintained it will wear out. Anything that is properly maintained does not wear out. If it is not properly maintained it goes.

"Q. Do you want to say that if properly maintained it does not wear out.

"A. Yes.

"Q. Never does?

"A. Never does. There may not be any original part after a series of years, but it will be the same form, the same machine. You can replace part by part.

"Q. Have you ever heard of any court or any writer adopting your theory, Mr. Miller?

"Mr. Ransom—Objected to as absurd.

"The Master—Objection sustained.

"Mr. Ransom—This court has and the Supreme Court has.

"Q. Along these lines?

"The Master—Objection sustained.

"Mr. Chambers—Exception.

"Q. Are you familiar with the different rules laid down by the courts in fixing valuations for rate making purposes?

"Mr. Ransom—I object to that.

"The Master—Objection sustained.

"Mr. Chambers—Exception. Would you mind stating the grounds of your ruling?

"The Master—No, I won't state it.

"Mr. Chambers—Exception.

"The Master—It must be apparent to any reviewing Court. You are cross-examining this witness on a question of fact. We can leave the law out of it, so far as this witness is concerned. He has not qualified as a lawyer.

"Mr. Chambers—I thought I was cross-examining on a theory.

"The Master—I am not talking about theories, I am talking about facts. He states this as a fact.

"Mr. Chambers—It is a fact that they don't wear out?

"The Master—Yes.

"Mr. Cummings—He is an expert witness testifying to a theory.

"The Master—No, he is testifying to a fact.

"Mr. Cummings—We should be allowed to prove that his theory has never been approved by any Court.

"The Master—Go ahead.

"Q. Has this company, the complainant company, ever removed any mains or any other part of their plant because it was worn out?

"A. Not as far as I know.

"Q. Did they remove some purifiers?

"A. Yes.

"Q. Why?

"A. Because they were too small and in the way of the generator house which they were extending. It was cheaper to remove those purifiers and extend the generator house over that site, and put in new purifiers, than it was to build a new generator house. It was purely a question of economy. The purifiers were too small.

"Q. They did not wear out?

"A. No.

"Q. They were not worn out?

"A. No, they were not. Purifiers do not wear out.

"Q. Did they remove any engines because they were worn out?

"A. No.

"Q. Not any?

"A. No.

"Q. Did they not remove any meters because they wore out?

"A. No. Meters have corroded, I have no

doubt. They have in most situations that I have been in, where they are not cared for.

"Q. Then the company did not care for those properly?

"A. No.

"Q. Bad management, was it?

"A. No.

"Q. What kind of management was it?

"A. Very good management.

"Q. Not to care for them?

"A. Very good management in this company.

"Q. Not to care for them?

"A. No.

"Q. Well, I don't know what you mean by 'No.'

"A. No, I don't think you do. The facts are that there are certain exposed places in which gas meters are set. The company cannot go out and build enclosures for those meters. They set meters there, and in some cases they rust. Now, they do not care for them in one sense. That would require probably bringing them in every three months and repainting them. They leave them out there several years, and when they come in they are rusted.

"Q. Are those the only meters they have scrapped that you know of?

"A. As far as I know. They have scrapped very few meters, and I never made any elaborate investigation to get at the cause of the few meters that they have scrapped.

"Q. You say you dug up some mains?

"A. I did.

"Q. And those I suppose you say, as you said in the Consolidated case, would last forever?

"A. They will. There is no limit as far as I know on the life of a cast iron main.

"Q. You don't think they would ever want to take them out because they were inadequate as to size?

"A. I think in many cases—in some cases, not many, but in some cases they have abandoned pipe because it was inadequate as to size, yes, and I have no doubt they will do it again. Flushing is growing rather rapidly, and in the history of all gas companies they abandon pipe because it becomes inadequate as to size.

"Q. Are you acquainted with the term known as improvement in the art?

"A. I have been in the business thirty years, and I have made some inventions in connection with it, so I think I should.

"Q. Would they not replace or displace some of their apparatus on that account?

"A. The whole plant has been rebuilt on that account, and so I take it it may be done again. This was originally a coal gas plant.

"Q. And it is your idea, your testimony, that all of this plant and apparatus, mains and services and meters have their full value from the time they are put in there—have a value equal to cost, we will say, up to the time they are removed?

"A. They have a value greatly in excess of cost.

"Q. Up to the time they are removed?

"A. Greatly in excess of the cost at the present time.

"Q. Right up to the time they are removed?

"A. At the present time this plant has a value greatly in excess of the cost.

"Q. That is to say, here is a main that the company finds is inadequate because it is not large enough, and they replace it by a larger sized main. You say that that main that is replaced has a full value up to the moment when it is displaced by the larger one?

"A. If it is in good condition up to that time, yes.

"Q. Those meters that are rusted, they had a value equal to their cost, did they?

"A. As long as they were performing the

service I have taken them at their value. Every plant must have certain replacements, and parts are continually replaced. The system as a whole has its full value up to the time that it is shut down and abandoned."

(R-842-845, [1266-1271].)

The Master, in his opinion, proceeds upon the theory that the predecessor of the respondent actually paid for "franchises and rights," "preliminary and development expenses," "going value," and "undistributed structural items" the enormous amount of \$390,380.06, and that these elements actually cost the said predecessor, Newtown and Flushing Gas Company and its *predecessors*, and were worth on August 1, 1904, at least that sum. He included that amount in his final figure of value, \$1,655,877.94. There is no evidence to warrant this conclusion of the Master, and, in fact, no proof was offered that the franchises and rights, overhead expenses, or any of the intangibles, actually cost the respondent or its predecessors one cent over and above the amounts contributed by the consumers. This lack of proof was evident to the Master during the trial, as is shown by the following:

"The Master—Paragraph 7 of the complaint alleges that the said stock of \$600,000 and some of the said bonds \$816,000, were duly issued in payment of the reasonable value of the plant and the franchises purchased by your orator. As I understand it no proof was submitted of that allegation.

"Mr. Ransom—We have not regarded it as any part of the complainant's direct case to prove the cost of this property of this company. We are standing upon our proof of present value as we did in the Consolidated case." (R. 822 [1232].)

That respondent failed to offer proof of the intangible cost is further shown by the following:

"Mr. Ransom—* * * The complainant had not as yet offered proof of the cost to the company, the amount which the company paid, in 1904, for the property which it at that time acquired" (R. 1235 [1951]).

In addition, we quote the following:

"Mr. Ransom—* * * Might I just say a word that I started to say when I was interrupted. The complainant in this case, of course, has stood upon its direct case, upon the proof which it had offered, as to the present value of the property, based upon cost to reproduce new" (R. 1236 [1952]).

The basis for the Master's findings on the value of the property are apparent from his opinion, from which we quote as follows:

"At the time of the merger of the Newtown and Flushing Gas Company into the New York and Queens Gas Company, the total property and assets of the former (exclusive of working capital) were carried on the books of the former at \$694,678.00. Since that time, plant and equipment so acquired by the complainant on August 1, 1904, has been retired, at a book cost totaling \$24,189.14. The tangible property acquired on August 1, 1904, and still in service, is agreed to have cost before August 1, 1904, and to have been worth on that date, the sum of \$250,108 exclusive of franchises and rights and "going value" and the undistributed structural items under consideration. The deduction of these two items from the book total of \$694,678.00 leaves only \$390,380.86 as representing the book cost to the Newtown and Flushing Gas Company of the franchises and rights, the 'going value,' and the undistributable structural items here-

inbefore mentioned. There is sufficient evidence to warrant my conclusion upon the present record that the item of 'franchises, good will, etc.,' on the books of the complainant and its predecessors, covered, among other things, preliminary and development expenses and the various other items which Mr. Miller puts in a total of \$320,350, and also the cost of 'franchises and rights,' which Mr. Miller puts in at \$500,000; and I think it will be fair for me to say, for the purposes of the present case, that for all of these items just referred to, the New York and Queens Gas Company actually paid no more than their book cost to the Newtown and Flushing Gas Company and its predecessors, viz.: \$390,380.86, and that these elements had cost the Newtown and Flushing Gas Company and its predecessors, and were worth, on August 1, 1904, at least that sum."

Respondent owned no property, in 1904, other than that acquired by it from the Newtown and Flushing Gas Company, August 1, 1904. There is no dispute on the fair cost at that time of the tangible property so acquired by respondent. It is agreed that it *at that time* amounted to \$304,297.00; but it is disputed that said property has not depreciated. On the books of the predecessor, in 1904, there appeared a total book cost for that identical property, of \$694,678, so that by deducting therefrom the agreed-upon cost of the tangible property we ascertain that said book figure contained the sum of \$390,381.00 which is unexplained in the record.

We contend the Master was not warranted in concluding that there is sufficient evidence to justify the finding that the item of "franchises, *good will, etc.*," on the books of the respondent and its predecessors covered, among other things, preliminary

and development expenses and the various other items which the expert witness, Miller, put in his appraisal at a total of \$320,350, and that these items also covered the cost of "franchises and rights," which Miller put in at \$500,000. There is no justification for the opinion of the Master that for all of the aforementioned intangible items the respondent "actually paid no more than their book cost * * * \$390,380.86, and that these

"elements had cost the Newtown and Flushing Gas Company and its predecessors, and were worth, on August 1, 1901, at least that sum."

The record is wholly deficient in proof as to the cost or value of the franchises, and there is no evidence to lead the Court to believe that any sums were paid for franchises to the State or to the local authorities in the territory where respondent operates. This fact is apparent from the following excerpts from the record:

"The Master—What proof is there in the record as to franchises?

"Mr. Ransom—The books.

"The Master—Only that.

"Mr. Ransom—So far, and the franchise documents.

"Mr. Neumann—What do the franchise documents show, the price?

"Mr. Ransom—They speak for themselves" (R. 818 [1225]).

and again at page 1236,

"The Master—Was there proof offered of the cost to reproduce the franchises?"

"Mr. Ransom—Well, of course, the Miller exhibit in that respect related to the tangible property and the so-called non-distributed

structural cost in connection with the tangible property.

"Mr. Neumann—I understood Mr. Miller especially excluded franchises from reproduction cost.

"The Master—What I am trying to get at is, what basis have I for valuing franchises?

"Mr. Neumann—None at all.

"The Master—I am asking Judge Ransom something, Mr. Neumann.

"Mr. Ransom—I take it that from all of the evidence in this case, the testimony of Miller which related to that point, the evidence shown by the books, the evidence as to the acquisition of the property in 1904 and what was paid therefor, the judgment of the Board of Directors as to the value to be put upon those so-called intangibles—it is not a simple question, it is not a matter which has been adjudicated, it was the situation as to the value of the franchises and rights in the Consolidated case.

"The Master—That is what bothers me.

"Mr. Ransom—I am fully aware that it is a difficult question" (R. 1236 [1953]).

There is an absolute prohibition against the capitalization of franchise rights in the Public Service Commission Law under which respondent operates:

"§69. *Approval of issues, stock, bonds, and other forms of indebtedness.* * * * Provided, however, that the Commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the state or to any political subdivision thereof as the consideration for the grant of such franchise or right. * * *"

In his report to the Court below the Master said, in his findings (No. 34) that the fair value of the property on which respondent is entitled to have a fair return, exclusive of working capital, is at least the sum of \$1,520,877.94, and his figure comprises the following items:

1. "Tangible and intangible property acquired at the end of July, 1904, and still owned and used by it on January 1, 1920, exclusive of working capital" . . .	\$670,488.86
2. "Additional land plant, apparatus, mains and other property, less withdrawals, since August 1st, 1904, and exclusive of working capital"	850,389.08
" Total	\$1,520,877.94

The defendant District Attorney, one of the appellants herein, does not propose to burden this Court with a full discussion of the cost and value of the property or to set up figures representing the rate base, as that subject has been fully covered in the brief submitted by the Attorney General to this Court in the instant case. With his views on the subject we are in entire accord.

We contend that the Master erred in finding (No. 34) that respondent's actual investment in the property, and the fair present value, is at least \$1,655,877.94. Apart from the error he made in including in the investment a huge amount for franchise value, overhead expenses and other theoretical costs, as already set forth, the Master admitted that he made no deduction for depreciation "in whatever way calculated."

In a later part of this brief we deal with this matter of depreciation in detail.

We claim that respondent wholly failed to sustain the burden imposed upon it of proving the value of the property used and useful in the public service, and for that reason alone the decree should be reversed.

V.

The failure of the Master to take into account depreciation was in violation of the principles laid down by this Court.

The Master in his opinion (R. 57) states:

"In determining that the complainant's property has a fair present value to at least the amount of complainant's actual investment therein as found by me, viz.: at least \$1,655,877.94, I have made no deduction for what is termed 'depreciation' in whatever way calculated."

His reasons for refusing to make the deduction for depreciation are not very clearly presented (R. 57, 58, 59), but apparently are:

1. That the property has been well maintained and furnishes service as if new, and
2. That in respect of a very large proportion of gas property, there is no ascertainable "life expectancy."

As for the first reason, the Master was manifestly led into error by confusing the question whether the property furnished service as good as new, with whether the property itself was as good as new. The property might be furnishing service as

good as new, and yet its various constituent parts might be within a few years of necessary supersession, so that it would manifestly not be as good as new. The age and particularly the remaining life of the constituent parts, i. e., their remaining usefulness, determine whether they are as good as new or whether a deduction should be made for depreciation or impairment of gross capital.

As to the second point, however difficult it may be to ascertain the life expectancy of the remaining usefulness of the constituent parts of the property, it is nevertheless a fact which must be determined in the best way possible to make the requisite estimate of actual or unimpaired investment. Structures, apparatus, mains and equipment actually suffer wear and tear or are out of date to a substantial extent so as to affect their remaining period of usefulness, or have become inadequate for present requirements and will have to be replaced sooner than would otherwise be necessary. The extent of the impairment must be ascertained and deducted from cost new to establish the net capital devoted to the public service.

"The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property like real estate for instance, depreciate not at all, and sometimes on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount

of depreciation of a plant whose component parts are of different ages with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case."

City of Knoxville v. Knoxville Water Co., 212 U. S., 1 at page 10.

The following quotation is also to the point:

"In the deduction made by the referee for expenses there is an item of \$3,789.37 under the head of maintenance and it is clear that this does not include a proportionate allowance on account of the general depreciation which will ultimately require replacement. We suppose that judicial notice may be taken of the fact that in the conduct of many industrial enterprises *there is a constant depreciation of the plant which is not made good by ordinary repairs, which, of course, operates continually to lessen the value of the tangible property which it affects.* The amount of this depreciation differs in different enterprises, but the annual rate is usually capable of estimate and proof by skilled witnesses. No corporation would be regarded as well conducted which did not make some provision for the necessity of ultimately replacing the property thus suffering depreciation; and we cannot see why an allowance for this purpose should not be made out of gross earnings in order to ascertain the true earning capacity."

Peo. ex rel. Jamaica Water Supply Co., v. State Board of Tax Commrs., 196 N. Y., 39, at p. 57.

The Master's confusion is indicated by the statement that the "loss due to supersession cannot be said to have accrued during the period when the superseded unit was in service. It occurred when supersession took place. It became a proper charge

against the economies to be realized therefrom." He is palpably mistaken in this view, which in the past has been responsible for a large proportion of present over-capitalization and financial difficulties of public utility companies. It is this view which has charged at every stage the cost of reconstruction to capital account of street railways and other public utilities, ever increasing the interest burden of the properties and finally causing financial collapse.

Plant and equipment do not become obsolete or inadequate in a day. The obsolescence and inadequacy are factors which develop gradually, and their growing presence is usually apparent. When, for example, mains are placed in service, they are then sufficient for the need of the community and the expected service for the indefinite future, but if thereafter the population increases and a constantly increasing requirement is placed upon the mains, they become gradually inadequate and in course of time the fact appears clearly that sooner or later they must be replaced by larger facilities. *The supersession therefore is a gradual accrual and impairment, and at any time in ascertaining the amount of actual investment, it must be taken into account by deducting a proper amount for the depreciation from the cost new of the mains to fix the remaining capital value.*

The following decision is of interest:

People ex. rel. Queens Co. Water Co.
v. Woodbury, 67 Misc. (N. Y.)
490, at p. 493.

"It would be a false system of accounting which did not take into consideration the destruction of the value of property from whatever cause, so long as that cause is in constant

operation and can be foreseen with reasonable certainty. A loss due to functional depreciation is incurred in the operation of the business, and, therefore, should be charged as an expense of operation. (Citing Knoxville case, *supra*.) Machinery which today is sufficient for its purpose may become scrap iron through the development of inventions; and so pipes and mains, sufficient for a system of water supply as it now exists, may become valueless through changes in the conditions under which it is used. Because an iron pipe will lie fifty years in the ground without disintegration, it does not follow that the pipe will be of value to the company for fifty years. The conclusion reached as the result of actual experience seems to be more reliable. I am, therefore, inclined to approve the estimate of the relator as to the depreciation in preference to that of the city."

The Court of Appeals of this State affirmed the order in *Brooklyn Heights R. R. Co. v. State Board of Tax Commissioners*, where the lower court in 69 Misc., 646, at page 656, says:

"As surely as humanity travels to the grave, the machinery and equipment of a public service corporation travel toward the scrap pile. The plant and structures depreciate in less degree but as certainly. This is ordinary depreciation.

"But another form of depreciation in the case of properties here being valued takes place. The machinery or equipment, while still capable of years of service, becomes inadequate to do the work demanded—not only by the corporation, but by the law itself. In the case particularly of electrical machinery, the type becomes obsolete by reason of invention and increasing public demands frequently require in aid of safe and adequate service that the obsolete appliance or equipment give way

to the new. Property which in itself may be almost indestructible in the hands of a public service corporation may be required to be replaced by the requirements of the public which the corporation serves. These requirements for change of plant, structure and equipment and their replacement, can be and are made by the State itself. Some of these changes are capable of definite ascertainment. Others are not so readily ascertainable. Many of them, however, may be provided against for the future by setting apart from gross earnings a reasonable sum to create a reserve against the day when they shall come."

Whether or not the company accumulated a "depreciation reserve" is of no consequence. If it did, it followed sound principles of finance and actually maintained its full investment according to the intent of the law against impairment of capital.

But if not, the depreciation is nevertheless real and must be taken into account in determining the actual investment. In the first instance, the unimpaired capital is equal to the gross cost of the property, less the amount of the depreciation reserve, and this net figure is equal to the original amount of money devoted to the enterprise by the stock and bond holders. In the second instance, the company has suffered an impairment of capital and the actual investment is thus the cost of the property, less the estimated depreciation. In either case the actual investment is the cost less deduction for depreciation covering wear and tear, obsolescence, inadequacy and all other factors of deterioration and impairment.

"If, however, a company fails to perform its plain duty and to exact certain returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon

overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

Kansas City So. Ry. Co., v. U. S.,
231 U. S., 423, at p. 448,

quoting approvingly the court's former decision in *City of Knoxville v. Knoxville Water Co.*, 212 U. S., 14.

In this case, as is demonstrated elsewhere, the respondent earned a net income sufficiently large to set aside an amount sufficient to cover depreciation; in fact the respondent did up to 1914 set aside moneys for renewal and contingency, which fund it converted into a new contingency fund by resolution of the Board of Directors, on November 16th, 1915 (R. 703). If the respondent has failed to set aside a sum sufficient for a depreciation reserve it has deliberately failed to comply with the requirements of the uniform system of accounts prescribed by the Public Service Commission, the decisions laid down by this and other courts and the sound principles of financial management universally recognized and incorporated among other places in the system of accounts prescribed by the Interstate Commerce Commission.

"This in effect ignores depreciation—an inevitable fact which no system of accounts can properly ignore." Kansas City So. Ry. Co., 231 U. S., 423 at 449.

The Master, referring to the testimony of the witness Hines (R. 59) to the effect that the de-

preciation reserve should be accumulated and invested in property and that in such a case when the funds are needed for renewals and replacements they would be provided by issuing securities against construction work which has been done out of depreciation funds, states that:

"The obvious fact that having deducted the amount of reserve temporarily invested in property from that on which he proposed the company should be allowed to earn a return, has, to all intents and purposes, destroyed the earning power of such property and investments; that therefore he could not issue any securities against such property, there being no earnings therefrom with which to pay interest on securities; that the reserve could never, therefore, be availed of for the purpose for which it was alleged to have been created, and that it would be, in fact, as if it had never been created. Thus he not only failed to sustain his contention that a 'depreciation reserve' was necessary for the purposes which he alleged, but he proposed to treat the reserve as if he himself believed it to be both unnecessary and ineffectual, except for the purposes of justifying a deduction from the complainant's investment."

By this statement the Master seemed to consider that he demolished completely the contention for the deduction of depreciation. But as a matter of fact the discussion is entirely besides the point, because as heretofore shown the amount of depreciation does not depend upon whether a reserve has been kept. The Master, however, shows himself singularly confused in this treatment of the matter and clearly does not grasp the effect of the witness' testimony. If a "depreciation reserve" has been accumulated and the funds expended for property, then as an arithmetical matter the total

cost of the property including the invested reserve is by so much greater than the original investment; so that if the amount of the reserve is deducted from the total cost the full actual investment is shown; and if a return is allowed on the amount the earnings will be adequate to meet the requisite interest and dividend payments. This is so elementary as to require apology for its statement. Then, when renewals and replacements are made, the necessary cash, since the depreciation funds have already been expended for property, may be obtained through the issue of new securities. This process thus results in a net additional investment, upon which a further return would be allowed, and the earnings would be sufficient to meet the new interest and dividend charges. At this stage again, after the old property has been taken out of capital account and deducted from the depreciation reserve, the net actual investment would be equal to the total cost of the property less the balance of the depreciation reserve—and none of the conclusions of the Master are applicable to the situation which he clearly did not comprehend. But suppose no depreciation reserve has been accumulated, nor a substitute of so-called surplus, then all additions to property must be financed out of new security issues with corresponding increases in gross investment. Now suppose substantial supersessions take place, resulting in retirements of old property and installation of corresponding new facilities. Then, clearly, new securities must be issued for the replacements, resulting in a greater showing of gross investment, and if the retired property is taken out of capital account it stands as a manifest impairment of capital; the total securities will be correspondingly in excess of even the

total gross cost of the property left in service. The depreciation reserve is thus necessary not only to meet the actual retirements of plant and equipment but to make provisions for the retirement as the factors limiting their life gradually work their effect. If there is no such accumulation of reserve, and no corresponding other allowances, there is inevitable impairment of capital although not shown directly by the accounts, and the determination of actual investment thus requires the computation of depreciation to be deducted from the gross cost of the property.

The Master is equally wrong in his final conclusion that if a depreciation reserve is accumulated its effect is to make piecemeal purchase of the property—"really asking the consumer to pay for the plant instead of paying a return on the investment" (R. 59). But, the accumulation of the reserve adds *pari-passu* to the gross cost of the property and therefore does not diminish the contribution to the total cost by the security holders. The reserve simply provides for the proportion of the total cost of plant and equipment in use properly chargeable to past operation whether for physical wear and tear or for obsolescence and inadequacy which have already appeared and have shortened the remaining life time of the constituent parts. At any time, therefore, the total cost of the property, less the depreciation reserve, is equal to the actual investment by the security holders; there is never a diminution, no piecemeal purchase, and the return on the investment is not affected. The accumulation of the reserve simply takes out of earnings the proper allowance for the complete maintenance to prevent impairment. It does not result in amortization or purchase of capital.

To bolster up the theory claimed by the respondents through the witness Miller and sustained by the Master and the Court below, resort is necessarily had to the proposition that there is no depreciation. Mr. Miller (R. 843), testified as follows:

"Q. They don't wear out? A. No.

"Q. They were not worn out? A. No, they were not.

"Q. Purifiers do not wear out? A. No.

"Q. Not any? A. No."

Respondent claims that there should be no allowance for depreciation whether the basis be original cost, book cost or reproduction cost new. Mr. Miller, testifying with reference to a Ford Runabout Automobile purchased in 1913, took the position that not alone was the respondent entitled to a return upon the cost to reproduce new but made no allowance for depreciation whatsoever, despite the fact that the car had been in use for seven years. He did this presumably upon their theory that replacements of parts could be had from time to time, the automobile could continue in service forever, implying therein two propositions, (1) that the Ford Car could continue to give service as good as new forever, and (2) that its value was therefore the value of a new car. The following is his testimony on that point (R. 838):

"Q. This Ford Runabout Model 1912, how old was that? A. That was bought in 1913.

"Q. So that the Ford is seven years old, and you put a price of \$546.50 on it? A. Yes."

"Q. That is reproduction? A. Yes.

"Q. That is what they paid, is it, in 1912? A. Yes, in 1913."

The witness Miller testifying with reference to other automobiles in use by respondent (R. 836),

when pressed as to the proposition that cars would eventually wear out did admit that they would, answering as follows:

"A. Automobiles will wear out, certainly."
(R. 836 [1257])

and attempted to justify the figures he gave on the ground that the original cost of these automobiles was less than the reproduction cost, thereby evading the issue as to whether or not there was depreciation. The record thus discloses his admission in this instance that automobiles do wear out and on the other hand that purifiers do not, as disclosed in his testimony above set forth.

It is submitted that the decisions of this Court and other courts, below set forth, have amply sustained the common experience of mankind that all equipment sooner or later gives out and becomes useless for the service it is intended to render and finally have no other value than that of mere scrap or junk.

In *People ex rel. Kings County Lighting Company v. Willcox*, 156 App. Div., 603, 616, after quoting a portion of the opinion in *Knoxville v. Knoxville Water Company*, 212 U. S., 1, 13, the Court said:

"This quotation completely answers the contention on the part of the relator that no allowance should be made for depreciation because the evidence is that the efficiency of the relator's plant continued to be equal to 100 per cent.; since it is manifest that deterioration to some extent must precede the loss of efficiency, and the mere fact that the efficiency remains stable does not necessarily contravene the other fact that deterioration has set in."

"In the case at bar the Commission followed the rule laid down by the Court of

Appeals in *People ex rel. Manhattan Railway Company, vs. Woodbury*, 203 N. Y., 231, as to the method of estimating the depreciation and the rule indicated by the Knoxville case of deducting the thus ascertained amount of accrued depreciation from the cost of reproduction new to ascertain the present value of the tangibles in use. We think this entirely proper, especially in view of the fact that it allowed appreciation in land values."

Respondent's witness O'Connor, testifying as to the value of buildings owned by it, was questioned as to deterioration. He was compelled to go so far as to admit deterioration, though he would not admit that they would deteriorate to such an extent that "they would not be any good at all" (R. 804). However, the Master despite his subsequent opinion did comment as follows (R. 804) :

"The Master—It depends on how a building is cared for as to how long it will last. If you take care of a building properly it will last 50 or 60 years."

To which O'Connor responded as follows:

"The Witness—And longer than that too."

Inasmuch as the judgment of the court below is based upon the estimated cost of property with no deduction for accrued depreciation, it should be reversed.

VI.

Appellants have not had a fair trial.

In the case of *City of Knoxville v. Knoxville Water Company*, 212 U. S., Mr. Justice Moody, writing for the Court, said (p. 8) :

"There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. *In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case.*

"Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master confirmed by the trial court are without weight, or that they will not, as a practical question, sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit."

The Master throughout the trial was very hasty and impatient and evidenced this attitude almost exclusively towards appellants' counsel. The record discloses reference by the Master to the extreme value of his time and his desire to shorten the proceeding so as to enable him to attend to his business affairs elsewhere. The following excerpts support this statement:

"The Master—* * * Counsel in this case from now on must not assume that time is go-

ing to be occupied. They must have the witnesses here. My time is getting too valuable and too short, I cannot afford to do it. Every minute counts with me now" (R. 1011).

During the discussion as to whether or not tax reports were competent proof as to the value of the real estate, some little discussion ensued, whereupon the Master broke out with the following:

"The Master—If you are going thus to keep me going until one o'clock you need not waste any more time with it.

"Mr. Newman—No, I am not.

"The Master—*Because I can go out and talk business for a few minutes*, if that is what you are driving at. But there is no sense in keeping up the discussion" (R. 1013).

And again at page 803:

"The Master—We have had that, go on.

"Mr. Chambers—Let him say.

"The Master—You are going to finish with him before one o'clock; now go ahead."

His impatience was such that he seemed to have advance knowledge as to what question counsel was to put to the witness, as appears from the following:

"Mr. Neumann—Just one more question—I don't know whether it is covered.

"The Master—Sure, it is covered.

"By Mr. Neumann—Do you know where the testing station of the New York and Queens Gas Company is?

"The Master—Yes, that is covered. It is in the same building, on the same riser, the same case all right. Mr. Wacker, step down."

We deem it our duty to call the Court's attention to the Master's attitude to the statutory law.

His preconceived ideas were boldly expressed in the following:

"Mr. Neumann—May I put this objection on the record here, that the statute requires this company to furnish 22 candlepower gas; that means very (obviously every) part of the day.

"The Master—I think it is a perfectly stupid, silly statute." (R. 1147.)

The Master's irate attitude and lack of judicial temperament were exhibited when Mr. Tobin for the Attorney General, offered proof as to violations of the statutory requirements as to candle power between the years 1914 and 1918, which the Master declined to accept on the ground that he would "not go back as far as that" (R. 1046). The following colloquy ensued:

"The Master—Nonsense; you do not expect me to find a deliberate violation of law with a record like that?

"Mr. Tobin—For the four years between 1914 and 1918 the average shows a violation of law.

"The Master—Oh, you won't get anywhere with me on that stuff. Make your record."

The Master did not hesitate in the midst of the trial to embarrass counsel by characterizations of counsel's line of questions as stupid, and to unduly restrict and restrain counsel from making what he deemed to be proper objections. The following colloquy is typical:

"Mr. Newman—Objected to on the ground it is incompetent, irrelevant and immaterial, based upon an assumption, and hypothesis and a guess, and no proper foundation laid for it.

"The Master—I do not believe you know what you are talking about.

"Mr. Newman—What was the Master's comment?

"The Master—It is quite apparent to me you don't know what you are talking about when you object to a question of that kind.

"Mr. Newman—Exception.

"Mr. Cummings—You don't know what it is going to lead up to. That is all.

"The Master—I am trying to indicate to you; I am trying to cross-examine this witness."

The Master's air of superiority and his criticism of counsel, is illuminated by the following extract:

"The Master—The trouble, Mr. Tobin, is that you are about twenty-five years younger than I am, and you don't recall the trouble that these companies had to get the people away from coal ranges and to the use of gas, and once having gotten them to use gas you don't need to do any more to get them to use it. That is what I am trying to bring out from Colonel Miller. I have not seen coal ranges to speak of in that Flushing section in fifteen years.

"Mr. Tobin—The particular point about it, if the Master please, is that there is considerable to be read into the record here, capital expenditures which are not capital expenditures.

"The Master—I am not worrying about that.

"Mr. Tobin—Well we are worrying about it.

"The Master—I am trying to demonstrate the proposition in behalf of the defendants that there is not any going value for me to allow in this case, and you are not letting me do so. It is a perfectly stupid line of objections; there is no sense to it at all. I am asking him whether there was in 1865, 1866 or 1870, and I am trying to eliminate it since 1904, and you gentlemen will not let me. It seems to me my

duty in this case to get this record in such shape that it will clearly present my views on this question of going value, and I am going to do it. Both sides can keep on objecting as long as they please.

"Mr. Newman—We are endeavoring to make the record.

"The Master—You are simply lumbering up the record with a lot of useless objections."

(R. 865.)

Further on (R., 866), Mr. Newman for the Public Service Commission objected to a question put by the Master, whose purpose it was to elicit the fact that in a section like Douglaston "where houses are going up" and where they have been pressing for the extension of gas mains to get gas "no expenditure of money is required to get them to use gas," his objection was to the entire line of questions of this sort. The Master said as follows:

"You can go on and object as often as you like and make yourself as ridiculous as you please. The objection is overruled."

To which exception was duly taken.

Another illustration occurs in the Record at page 798:

"The Master—As a matter of fact the bill on its face shows that there is some tax unpaid for the year prior to 1919. It may be a special franchise, it may be a real estate tax, but it has nothing to do with his testimony.

"Mr. Newman—And we had the officers of the company here who could have identified that and we could have gone into that question; we are deprived of our rights to cross-examine on that point and put it on the record.

"The Master—That is nonsense.
"Mr. Newman—Exception."

While endeavoring to bring out the strong interest of the witness Alrich, who testified that he was employed by respondent and that his salary was paid by the Consolidated Gas Co., the parent company of the respondent, and that the said Alrich had previously testified in another case that he devoted all his time to the Consolidated Gas Co., the Master broke out with the following impetuous statement:

"The Master—He is very much interested; he has already stated that he is employed by the Consolidated Co., which company owns all the stock of the New York & Queens Co., and he feels that this is part of his employment and he is paid by his employer. Now, if you want to show that he has been convicted and had been to jail, go ahead, if you think that will have any bearing" (R. 499).

The Master's lack of judicial poise and his injudicious use of language is evidenced in another outburst:

"Q. Then suppose I present another situation where a half dozen men in this room have gotten suddenly crazy and want to own the gas business, and they want this particular plant like Flushing; for some reason or other they think there is a great future to it—and the New York & Queens Gas Company and its trustees know the situation. Now, they are not going to sell it for what it is going to be replaced for, ordinarily, are they, to these crazy people that are going into this business?" (R. 1422).

The Master was unreasonable in the demands made upon counsel for the Public Service Commis-

sion to immediately proceed to cross-examine Mr. Allison, who presented (R. 1403-1417) his views on whether or not depreciation should be deducted for purposes of rate making. The following colloquy occurred:

"The Master—I see no reason for postponing this cross examination. *If I were counsel for the defendants I could proceed with it very easily.*

"Mr. Newman—I will tell the Master that I am not prepared to go on, and if I am forced to go on I will have to put myself in the hands of the Master and bow to his wishes, and respectfully except to his forcing me to go on at this time with the cross-examination.

The Master—Well, *I direct you to.*

Mr. Newman—I take an exception."

Thereupon Mr. Newman proceeded to object to cross-examine the witness on a very technical matter which required careful analysis.

The Master's arbitrary attitude towards appellants' counsel and his exacting demands in the quality of the proof when offered by them, is evidenced by his requirement that official records of tests made by inspectors of the Department of Water Supply, Gas and Electricity were not competent proof unless substantiated by the testimony of the inspectors themselves (R. 1030). Further, when the testimony was offered, the Master was critically careful about the order of the proof and insisted that Mr. Wacker, the official who made the gas tests, was to first testify and then Mr. Birdsley was to corroborate Mr. Wacker's testimony, the former having been present when the latter made his tests. The Master had apparently definitely made up his mind in advance as

to the unreliability of tests for candle power. At page 1034 occurs the following:

"The Master—Yes, I am going to have Mr. Wacker get on this stand and I am going to have him testify as to what he did, and I am going to bring out from Mr. Wacker, *as I did from Mr. Wacker on the Consolidated trial, that it is a matter of human judgment subject to human error.* You might as well understand it now as any other time."

It would seem that if there be any merit in this view it was the duty of counsel for the respondent to handle the affairs and interests of the company at the trial, particularly as it was represented by able and distinguished counsel, who had gone through a long trial of the Consolidated case, and who was undoubtedly wholly conversant with the testimony in that case, as referred to by the Master. This was unjustified intrusion and taking the advocate's part.

The Master evidenced his extreme impatience and intolerance and unduly interfered with cross-examination, as is evidenced in the following:

"A. Oh, I do not recall just what year it was.

"Q. About four or five years ago?

"A. I think this one is No. 2.

"Q. And how many years does this cover?

"A. I cannot tell you all that without looking at it. It is in my testimony before when I was looking at the books.

"Q. Would you mind looking at it: it is right in Court here?

"The Master—I'm not going to waste time on that; I will not let the witness look at it.

"Mr. Neumann—Does your Honor by rule mean—What is that?

"The Master—I will not let witness look at it. Look at it yourself."

The Master's arbitrary attitude towards the counsel is well illustrated in the following colloquy (R. 525):

"The Master—I want to get my records straight today. There is no appearance by the Queens County District Attorney, is there—no counsel representing the District Attorney of Queens County?"

"Mr. Chambers—You have ruled him out apparently."

"Mr. Cummings—You have ruled him out."

"The Master—I am saying now, Mr. Hyatt having left the room, is there any counsel representing the District Attorney of Queens County? I understand there is not and the records will so show. I know that the District Attorney of Queens County ought to be represented, and I wanted the record to show that he is not."

"Mr. Chambers—if the Corporation Counsel cannot get in any other way then we will appoint him counsel."

"The Master—You will not."

"Mr. Chambers—I will get some more. The Court cannot stop us from having another."

"The Master—I am going to make a rule about you now. Who is going to handle this case for the Attorney General?"

"Mr. Chambers—Why, there are several of us here."

"The Master—Well, who is going to do the talking now?"

"Mr. Chambers—I cannot tell you."

"The Master—Somebody is going to do the talking for the Attorney General's office, and one counsel is going to be recognized and not more than one. Who is it going to be, Mr. Chambers? You can make your own selection."

"Mr. Chambers—I cannot tell you at this time."

"The Master—Mr. Tobin, isn't it?"

"Mr. Tobin—Yes.

"The Master—Having last taken the floor, I will recognize Mr. Tobin and nobody else.

"Mr. Chambers—I take an exception.

"The Master—And the stenographers will take no statement by anybody else from the Attorney General's office until I get a statement that Mr. Tobin has been supplanted.

"Mr. Tobin—Why, that is not proper, if the Master please, because I am working entirely under the direction of Mr. Chambers.

"The Master—I want to know who represents the Attorney General here, once and for all. I am going to take objections by all counsel, Mr. Chambers can make the statement or not, just as he pleases.

"Mr. Chambers—No, I decline to make the statement as to who is going to do the talking. I am perfectly willing to abide by the ruling that one counsel talk at a time. You can make your ruling and I will take exception.

"The Master—I did not say anything about one counsel talking at a time. *There is only one going to do the talking today.*

"Mr. Chambers—I take an exception, I decline to say that today, because I have not considered that. Throughout these cases I think it is perfectly proper for the Attorney General to be represented by one or more counsel, and it is perfectly proper for one or more to cross-examine, so long as one starts it and completes it.

"The Master—For the orderly conduct of this proceeding I shall only recognize one counsel talking in behalf of the Attorney General. The Attorney General can have six representatives here, if he so desires, but only one counsel will be recognized today. Mr. Tobin having taken the floor and cross-examined the last witness, I am going to recognize Mr. Tobin and nobody else today.

"Mr. Chambers—I take an exception."

We respectfully state the attitude of the Master was out of harmony with the reasonable rules in general vogue in the Courts, and, in this instance, highly prejudicial to the interests of the defendants.

A question was made by one of appellants' counsel to ascertain from Mr. Raynor, Secretary of the respondent, the source of certain figures given by Mr. Raynor in the exhibit offered in evidence as to the cost of mains and services added to the account as it stood on January 1, 1919. This was proper information that counsel was entitled to elicit from the witness. The Master, in the abrupt manner that characterized him throughout the trial, would have none of it. We quote the following:

"Q. Well taking the cost of mains and services that were added to the account as it stood on January 1, 1919, how did you obtain that value?

"The Master—What is that?

"Q. Taking the mains and services laid in the year 1919 which were added to the mains and services value as of January 1, 1919, how did you obtain the figures there necessary to add to the mains and services as they stood on January 1, 1919?

"Mr. Ransom—Objected to on the same grounds, not cross-examination of this witness. You cannot put in an exhibit and then turn around and cross-examine the witness about that exhibit. The document itself shows the method and the peculiar basis laid down by the statute.

"Mr. Tobin—The statute has nothing to do with it. I am simply asking Mr. Raynor how he got his figures and what was put in there for the mains and services for 1919.

"The Master—Put in where?

"Mr. Tobin—Put in this report.

"The Master—Objection sustained.

"Mr. Tobin—Exception. If your Honor please, I think we are entitled to know how they obtained their figures."

(R. 799.)

Mr. Woods, who attempted to qualify as an expert, was not to be thoroughly examined as to his qualifications. It was sufficient for the Master that he had been in charge of operations of plants of large gas companies. His views are palpably erroneous on that point, which is clearly evidenced in the following:

"Mr. Ransom—I object to the question, it has nothing to do with his qualifications.

"Mr. Hyatt—I want to test his knowledge.

"The Master—The question will not be allowed.

"Mr. Hyatt—Exception.

"Mr. Hyatt—He is partially qualified, I will concede that.

"Q. The cost of labor, Mr. Woods, is that about uniform with respect to certain kinds of labor in all gas works?

"The Master—On the general gas making industry and I am going to accept him as such without further waste of time.

"Mr. Hyatt—Exception.

"Mr. Neumann—That inures to the benefit of all defendants.

"The Master—Certainly. There must be somewhere or sometime in this case when counsel will concede that day is day and night is night.

"Mr. Hyatt—I object to that. I do not want to be captions at all, but this is technical information we are after and I think the witness should qualify thoroughly.

"The Master—I say it is perfectly ridiculous to even suggest that a man who has been

in actual charge of the operation of the plant of the Consolidated Gas Co., and of the Astoria Light, Heat and Power Co., and this company and the Standard Company, for over twenty years, with the responsibility that this man has had, according to his sworn testimony here, is not competent—I say that is a ridiculous position to take.

"Mr. Chambers—Do you think that a lawyer engaged in practice for twenty years, makes him a lawyer? I don't.

"Mr. Ransom—with some it does not.

"The Master—*A man who has practiced law for twenty years is competent to testify as an expert on matters of law; I don't care how good or bad he is.*

(R. 402.)

VII.

Respondent's books of account, admitted in evidence over objections and exceptions of appellants, are not proof of their contents.

The Master found and reported that (8):

"Since January 1, 1909, the books of account of the complainant company and of all other gas companies in the City of New York have been required to be kept in accordance with the rules and regulations of the defendant Public Service Commission of the State of New York for the First District, which Commission has had certain jurisdiction over said companies pursuant to the provisions of

the Public Service Commission Law of the State of New York, and find that the books of the complainant company have been kept in conformity with the said rules and regulations and that they accurately set forth the facts therein undertaken to be shown." (R. 35 [59].)

Under his rulings, and over the objections of counsel for appellants who took exception to these rulings, the Master admitted in evidence the General Ledger, Journal, Operating Expense Ledger, Accounts Payable Ledger, General Cash Ledger, and many Tabulations from the books of account.

The books admitted are merely partial transcripts of other books, records and papers, many of which were not proven or even produced.

In the Consolidated Gas Company case which is now before this Court and is to be heard simultaneously on the appeal of the defendant state and local authorities, this point is argued at length in the brief of the appellant District Attorney Swann. It is therefore unnecessary for us to argue it herein, but we believe there are several aspects in which the record in the instant case differentiates the facts and makes the error of the Master altogether inexusable. He himself saw there were even better grounds in this case than in the other and larger case for calling upon the respondent to produce proof of its operations:

"By the Master:

"Q. You have not made entries in them yourself?

"A. Not in general books, no.

"Q. In any books?

"A. Well, some of the subsidiary books, yes. For instance, I approved all vouchers, all sundry creditors' vouchers, and classified them.

"Q. But the actual bookkeeping work is not done by you or under your immediate direction; you have a chief bookkeeper or accountant or somebody?"

"A. Yes, but I am in conference with him all the time. He comes into my office and asks me questions with regard to the books, and I look over them."

"By Mr. Ransom:

"Q. So you classify the vouchers for materials and supplies and the like?"

"A. Yes, I do.

"Q. And do you make up the various reports of the company?

"A. Well, they are made up under my direction.

"Q. That is, you have direct and personal charge of the doing of that?

"A. Yes.

"Q. Are you familiar with the books of the New York and Queens Gas Company, and the method of making entries therein?

"A. I am.

"Q. Will you describe what books of account and subsidiary records were kept by the New York and Queens Gas Company during the years 1919 and 1920?

"The Master—Do you believe that this will be a case where I am forced to take in general books of account, the same as I did in the Consolidated Case?

"Mr. Ransom—I so think.

"The Master—I should not imagine it would be very difficult to put in somewhat better proof here.

"Mr. Ransom—I think we will be able to produce somewhat more detailed proof in certain respects.

"The Master—You can have the man who made the entries in books, I imagine, and bring in the original papers, with a small company like this.

"Mr. Ransom—We can do something like that." (R. 180 [54-55].)

Respondent called as witnesses, who had knowledge of the books:

(1) Maynard H. Spear (R. 177), General Manager since 1907, who was asked to describe *the system* by which entries relating to the costs of materials used in the manufacture of gas find their way into the operating expense ledger (R. 181).

The Master again showed, at this part of the record, that he was not satisfied with the paucity of proof that was being presented:

"The Master—Yes, I have been asking these questions, Judge, to indicate how you might give us better proof on this than you did in the Consolidated Case.

"Mr. Ransom—Perhaps not better proof, but more proof.

"The Master—Well, perhaps a little better too." (R. 184.)

Spear was also asked to describe *the method* by which the record is kept of the amount of coal used, and *the system* of keeping track of the labor elements.

He did nothing more than describe a system, as the Master said in almost those very words. (R. 185 [63].) See also page 201 of the record.

(2) Arthur W. Teele, a public accountant, employed by respondent in the latter part of 1918 to make an examination of the accounts for the year 1919 and for 1918 (R. 222 [125]) with a staff of assistants. He merely made a percentage check of certain records, well instanced by the following:

"A. The consumers' accounts for sales of gas are contained in nine ledgers. I took one hundred accounts for the months of January, February, November and December, 1919, * * * * and checked them from the

original index books to the consumers' ledgers and to the "bill registers, or consumption record, as it is called, in which the total amount of gas entered upon the consumers' ledgers is made up. We did that for four months, and checked the summaries for all the months in the year to the journals, and from the journals to the ledger accounts representing the sales." (R. 230-1 [139-40].)

(3) William Raynor, Secretary (R. 262), who is not a certified public accountant but has immediate charge of the books of account of the respondent. He became secretary in January, 1920 (R. 263), and before that was head bookkeeper and chief clerk. He testified that with two exceptions the books are kept in accordance with the uniform system of accounts (R. 264). The setting up of renewals and replacement account, on the instructions of the Board of Directors, results in a credit balance, or, in other words, the actual charges are less than the sum resulting from the setting aside of three cents per M. cubic feet of gas sold (R. 265). He tests the accuracy of the books of account by *trial balance at the end of each month*. In answer to the Master's question he testified that he does not make the entries in the books but had made them previous to May, 1919 (R. 266), although only some of the entries in the books in evidence are in his hand writing.

All that Raynor proved was that in his belief the entries made by him were correctly transcribed from other records that he did not make (R. 267).

The character of proof presented by respondent is shown by the following questions to and answers by Raynor:

"By Mr. Ransom:

"Q. Are you prepared to say the books of account and records correctly reflect the transactions of the company?"

"A. They do.

"Q. Are they correctly kept?

"A. Yes, sir." (R. 267 [201].)

Raynor testified that a bookkeeper kept these books of account since May, 1919, and that Miss Mold and Mrs. Townsend also made entries in the books (R. 268).

(4) William J. Foy, General Bookkeeper, not a certified public accountant (R. 287) who, since May, 1919, has had charge of the books. He merely testified to entries in the general books that are in his handwriting (R. 288). His direct testimony takes up less than two pages of the record.

This bookkeeper never checked any of the underlying data:

"Q. Now, Mr. Foy, if I understand your testimony correctly, it is to this effect, that if the underlying data from which you make the entries is incorrect, then the entries in the books are also incorrect, and if the underlying data is correct, then the entries in the books are correct—is that true?"

"A. *I never checked back any underlying data. I take what is given to me as being correct.*" (R. 294 [246].)

(5) Martin Morrison, Superintendent (R. 569), who testified as to the method of receiving materials at the works. He had no personal knowledge of the quantities received or the amounts used. He merely prepares monthly statements of the daily operations, but these were shown to be in error in several instances.

It is very evident that the books admitted in evidence are not books of original entry, and yet not one witness was called by respondent to prove the underlying data on which the entries in these books rest.

We respectfully refer the Court to the brief of the defendant Swann in the Consolidated Gas Case, which case is now before this Court, wherein, at page 171, it is contended the cases agree that the books offered must be books of original entry, that *the one who made the entries therein* must be produced and testify as to their accuracy, or his death or unavoidable absence must be established before secondary evidence of the entries made by him is permitted, and that a sufficient amount of competent evidence of the underlying data must be adduced so as to give a circumstantial guarantee that as the books are shown to be correct for a selected limited period, they are accurate for the entire period covered.

In this case, as in the Consolidated Gas Case, these elementary rules were flagrantly violated by the Master, as is evident from the foregoing pages of this brief.

In the instant case the appellant's did not demand verification of *every item* first hand. They did insist that, as to some essentials, the figures in the books should be explained and proved by some one who had personal knowledge of the facts.

We contend that respondent failed to prove the cost of making gas by merely offering the books in evidence, and for this cause alone the judgment should be reversed.

VIII.

The statute is presumed to be constitutional. The burden of proof is on the Respondent to establish the contrary beyond a reasonable doubt.

We do not deem it necessary to here argue at length in support of this thesis. The character and weight of proof required to set aside a statute as unconstitutional is so fully sustained by abundant judicial authority as to but need an enumeration of the cases.

- Wilcox v. Consolidated Gas Co.*, 212 U. S., 19, at p. 41.
- City of Knoxville v. Knoxville Water Co.*, 212 U. S., 1, at p. 8.
- Minnesota Rate Cases*, 230 U. S., 352.
- Des Moines Gas Co. v. Des Moines*, 238 U. S., 153 at p. 163.
- Detroit United Railway v. Detroit*, 248 U. S., 442.
- San Diego Land Co. v. National City*, 174 U. S., 739.
- Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co.*, 212 U. S., 423.
- Shepard v. Northern Pacific R. R.*, 181 Fed Rep., 765.
- Palatka Water Works v. Palatka*, 127 Fed Rep., 161.
- Chicago St. Ry. Co. v. Tompkins*, 176 U. S., 167.
- Northern Pacific Ry. Co. v. Lee*, 199 Fed. Rep., 621, at pp. 631, 632.

- Sinking Fund Cases*, 99 U. S., 700, p. 718.
- Fletcher v. Peck*, 6 Cranch (Star page), 128.
- Stanislaus County v. San Joaquin C. & L. Co.*, 192 U. S., 201, at p. 211.
- Missouri Rate Cases*, 230 U. S., 171, at p. 199.
- People v. McDonald*, 52 N. Y. Supp., 899.
- Volen v. Reichman*, 225 Fed. Rep., 818.
- Lincoln Gas Co. v. Lincoln*, 223 U. S., 357.
- Atlantic Coast Line R. R. v. Florida*, 203 U. S., 256, 260.
- Seaboard Air Line Railway v. Florida*, 203 U. S., 261, 270.
- Louisville & Nashville R. R. v. Garrett*, 231 U. S., 298.
- Louisville & Nashville v. Finn*, 235 U. S., 601, 607.

CONCLUSION.

**The judgment should be reversed,
the bill of complaint dismissed, and
judgment rendered in favor of the
appellants, with costs.**

Respectfully submitted,

JOHN P. O'BRIEN,

Corporation Counsel,

*Solicitor for Appellant, Dana Wallace,
District Attorney of the County of
Queens,*

Municipal Building,

New York.

JAMES A. DONNELLY,

M. MALDWIN FERTIG,

Of Counsel.